

**PROBLEMS RELATED TO DISCIPLINARY
MEASURES UNDER THE
CIVIL SERVANTS LAW**

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| Title | Page |
|---|-------------|
| Acknowledgment..... | I |
| Introduction..... | 1 |
| CHAPTER ONE | |
| 1. Administrative law, agencies and the civil service in general..... | 3 |
| 1.1. Definition, function and historical development of administrative law in general..... | 3 |
| 1.1.1. Definition of administrative Law..... | 3 |
| 1.1.2. Function of administrative Law..... | 5 |
| 1.1.3. The historical development of administrative law in general..... | 5 |
| 1.2. Definition of administrative agencies, modes of establishment and their power..... | 8 |
| 1.2.1. Definition of administrative agencies..... | 8 |
| 1.2.2. Mode of establishment of administrative agencies..... | 10 |
| 1.2.3. The power of the administrative agencies..... | 11 |
| 1.3. The concept of the civil service in general..... | 13 |
| 1.3.1. Power of decision making in the civil service..... | 15 |
| 1.3.2. The concept of disciplinary measure in the civil service..... | 17 |
| CHAPTER TWO | |
| 2. The civil servants law related to disciplinary measure under proclamation No. 515/2006..... | 19 |
| 2.1. The right and duties of the civil servants..... | 19 |
| 2.1.1. The right of civil servants..... | 19 |
| 2.1.2. The duties of civil servant..... | 21 |
| 2.2. The power of the head of the government office related to disciplinary measure..... | 22 |
| 2.3. Over view of the disciplinary committee..... | 24 |
| 2.3.1. The composition of the disciplinary committee..... | 24 |
| 2.3.2. The power and role of the disciplinary committee..... | 25 |

| | |
|--|----|
| 2.3.2.I. The power of the disciplinary committee | 25 |
| 2.3.2.2. The role of the discipline committee in the decision making process..... | 27 |
| 2.4. Accountability and responsibility of the administrative decision maker..... | 30 |
| 2.5. Reasons for imposing disciplinary action..... | 32 |
| 2.6. Disciplinary sanction and appeal procedure..... | 34 |
| 2.6.1. Disciplinary sanction..... | 34 |
| 2.6.1.1. Warning..... | 35 |
| 2.6.1.2. Financial sanctions..... | 36 |
| 2.6.1.3. Down grading..... | 37 |
| 2.6.1.4. Dismissal..... | 38 |
| 2.6.2. Appeal procedures..... | 40 |
| CHAPTER THREE | |
| 3. The problems related to disciplinary measure..... | 42 |
| 3.1. The problem related to composition..... | 42 |
| 3.2. The problems related to the approval of the simple disciplinary penalties..... | 44 |
| 3.3. Problems related to the witnesses testimony in the government office..... | 45 |
| 3.4. The problem of the non-legal professionals of the disciplinary committee members..... | 46 |
| CHAPTER FOUR | |
| Conclusion and Recommendation..... | 48 |
| 4.1. Conclusion..... | 48 |
| 4.2. Recommendation | 49 |
| Bibliography | |

INTRODUCTION

In the civil service, as in any other organized activity, certain amount of discipline has to be maintained. This is the purpose that administrative law, disciplinary codes and systems are designed for, and in pursuing it an attempt is made to reconcile a number of different requirements. Firstly, there is the need to protect the civil servants against the risk of arbitrary actions on the part of the agencies and to protect the agencies against the risk of abuses on the part of the civil servants. Both these risks are inherent in any civil servant relation. Secondly, there is the need to ensure that the administration runs smoothly in the interests of efficiency and at the same time to provide guarantees of fair treatment for its civil servants. However, from the agencies it is expected that the civil servants want to do a good job, by assigning the right person to the right job, by giving clear instructions, by observing and evaluating everyone's work periodically, and by praising a job well done to create a well disciplined and self-disciplined atmosphere by avoiding and preventing causes of discipline problems.

When a civil servant who commits minor or grave disciplinary offences, the sequence in progressive discipline is designed to stimulate a change in the behavior that begins with disciplinary process. The usual sequences of the minor infractions are oral warning, written warning and fine not exceeding one month's salary. When the disciplinary problems occur after the administrative measures have failed to bring about the desired change in behavior, or a civil servant who has committed grave disciplinary offense entailing fine not exceeding three month's salary, down grading or dismissal depending on the severity of the offense. The grave disciplinary offences entailing rigorous disciplinary penalties provided as in proclamation No. 515/2006.

The disciplinary action is taken by a government institution should be undertaken by disciplinary committee which shall investigate disciplinary charges brought against the civil servants and thereby submit recommendation to the concerned officials.

The thesis have three chapters which is sub-divided in to different topics.

The first chapter deals with administrative law, administrative agencies and the civil service in general.

The second chapter discusses the rights and duties of the civil servant, the power of the head of the government institution related to a disciplinary measure, over view of the disciplinary committee, accountability and responsibility of the administrative decision maker, reason for imposing disciplinary action and disciplinary sanction and appeal procedure.

The third chapter deals with the problems related to disciplinary measure: the composition of the discipline committee, the approval of the simple disciplinary penalties, the witness testimony in the government office and the non-legal professional members of the disciplinary committee.

Finally, conclusion and recommendations will be forwarded as a solution to the problems raised.

CHAPTER ONE

1. Administrative law, agencies and the civil service in general

1.1. Definition, FUNCTION and historical development of Administrative law in general

1.1.1. Definition of administrative law

Administrative law is a newly emerging field of study and it is not as developed as other disciplines¹. It is rather very difficult to provide a precise and commonly agreed up on definition of administrative law. Yet, it is possible to come up with workable definition as different scholars have done it. Accordingly, the writer would list a definition, which have provided by different scholars and then identify the common elements of the definition.

According to A.W. Bradley and K.D Ewing administrative law is “a branch of public law concerned with the composition, procedures, powers, duties rights and liabilities of the various organs of government, which are engaged in administering public policies².”

The second definition is according to the well-known author in the field of administrative law, K.C. Davis, “administrative law is the law concerning the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative actions”³.

¹ Property of St. Mary's University College summary notes on administrative law prepared by Dagnachew Asrat, April 2007, p.2

² A.W Bradely and K.D Ewing Constitutional and Administrative Law, 12 Edition P. 697

³ Keneth Curp Davice Administrative Law, 1995 p. 1

According to another well known writer, Breyer Stewart, administrative law is “the authority and structure of administrative agencies, specify the procedural formalities that agencies employ, determine the validity of a particular administrative decisions and the rule of reviewing courts and other organs of government in their relation to administrative agencies⁴”.

The fourth definition according to Nail Haeke and Naill Papwrth "administrative law is deals with the legal control of government and related administrative powers. This means that a significant emphasis of subject is to control exercised by the high court over the use of statutory powers by a wide range of administrative agencies"⁵, and the fifth definition according to sir Ivor Jennings contended that, "administrative law like other branched of law ought to be defined according to the subject matter, namely public administration. Administrative law then determines the organization, powers and duties of administrative authorities"⁶.

From the above definition we can understand that administrative law is a branch of public law, which limits the powers of administrative agencies with in the bounds of law. It describes the procedural formalities that agencies employ; determine the validity of a particular administrative decision and the rule of reviewing courts and other organs of government in their relation to administrative agencies. Generally, administrative law, have an executive power of the governments, in relation to govern the executive, legislative, and adjudicative powers.

⁴ Breyer Stewart administrative law 1995 edition p.2

⁵ Nail Hawke and Nail Paworth, Introduction to administrative law No. 1996 P. 1

⁶ O. Hood Philips and PAUL JACKSON constitutional and administrative law 7th edition P. 10

The main function of administrative law is as follows: The first one important function of administrative law is to enable the tasks of government to be performed. Then, administrative agencies are created by law and equipped with powers to carry out public policies, drawn up with in government and approved by parliament. A second function of administrative law is to govern the relation between various administrative agencies. The third function of administrative law is to govern the relations between an administrative agency and those individuals over whose affairs the agency is entrusted with powers⁷.

1.1.3. The historical development of administrative law in general

Administrative law is a very young field of study. It is a recently developed area of legal discipline, and its development is related to the development of administrative agencies in the modern society. In this sub section the writer will discuss the development of administrative law in America, England and Ethiopia.

The development of administrative law in America as a field of study dates back to 1880, marked by the establishment of the first independent agency. However, this does not mean that there were not administrative offices before that. Around 1770, there were government authorities that were authorized to make rules and decisions⁸. Its development has passed through four stages. In the first stage, the emphasis was up on its constitutional status. The second period emphasized the role of the courts in checking administrative decision making through judicial review. In the third phase, the procedures of

⁷ E.C.S Wade and A.W. Bradley Constitution and Administrative Law 10th ed. P. 593-594

⁸ Cited at No. 1 P. 1

rule making and adjudication come in to existence and strict adherence to them was emphasized and, in the fourth stage, the emphasis was on controlling administrative discretionary powers⁹.

On the other hand, the development of the England administrative law was for many years dominated by the comparison, which Dicey drew between the systems of administrative jurisdiction¹⁰. The England administrative law is the proto type of one of the main system of administrative law in the modern world. The law emphasizes on the role of law and rejection of arbitrary power, which is at heart of the development of the British administrative law. A second feature of the pertinent British constitutional structure is the supremacy of the parliament. In a third principle, the British courts can interpret the law. In the British system the emphasis is given to the protection of individual rights and legal control of administration. To do this, the British administrative law have six specific remedies, that is habeas corpus, certiorari, prohibition, mandamus, injunction and declaration¹¹.

On the other hand, the development of the French administrative law has become perhaps the most important model for the civil law countries and the administrative jurisprudence of the modern world. In the period, previous to the French revolution, legal control had rested in the hands of central and regional institutions, most of which were known as parliaments. If government or its agents acted in an illegal way, there was no appeal to the courts, but only the administration itself. The ministers then become the judges of their own cases, and this condition lasted until 1806 when appeal from the ministry could be made to a unit, which is the council of state. The administrative law in France reflects the existence of dual court system. Ordinary courts decide civil and

⁹ Property of St. Mary's University College Module 1 Introduction to a administrative Law P. 32-34

¹⁰ H.W.R Wade and S.F. Forsyth, 9th P. 13

¹¹ Cited at No. 7, P. 596

criminal cases between private individuals. The other set of courts called administrative courts, which adjudicate cases between parties when one of them is a government authority. A second feature of French administrative law is its relative simplicity.

The injured person brings his action directly to the appropriate center, now usually one of the administrative tribunals and seeks remedies¹².

To come to our country, the historical development of the Ethiopian administrative law dates back to the 1st B.C. The growth and history of administrative agencies is a recent phenomenon¹³. For a long past, there was un-interrupted monarchical rules. Besides, there were no institutionalized extensions of the central authority.

The idea of developing government power to the organs of the government and there was no formal civil service system¹⁴. Hence, the establishment of the first ministerial framework by Minilik II in 1908 marked the first benchmark in the history of administrative agencies in Ethiopia. In this act, seven different ministries were established. In 1931, Emperor Haile Selassie I promulgated the first written constitution, pursuant to art 11 of this constitution. The emperor was empowered to lay down the organization and regulation of all administrative departments for it laid down a constitutional framework for the establishment of administrative agencies. During the post liberation period, due to the growth in size and complexity of the executive organ following the establishment of the prime minister in 1943, many administrative agencies come into being. The further development in the area is that in 1943 Order no. 1 was enacted with the view to create new ministries. This Order raised the number of the ministries to eleven and

¹² Cited at No. 9 P. 38-39

¹³ Cited at No. 1 P. 15

¹⁴ Cited at No. 9 P. 43

in 1961, the central personnel agency was established by order No. 23/61 and the 1995 FDRE constitution lays down the framework for the establishment of administrative agencies, Art 77/2/ of the constitution, clearly provides that the council of ministries is empowered to decide on the organizational structure of the ministries and agencies responsible to it¹⁵. Until now, there is no administrative law in Ethiopia, except the draft administrative law. However, the administrative law exists everywhere in all types of laws, such as in the constitution, proclamations, regulations, directives and decrees.

Recently, there are attempts to enact administrative procedure. The act is intended to govern the whole operation of administrative authorities. The attempts that are currently being made are not exhaustive. The draft procedure proclamation deals with procedures for decision-making, procedures and mechanisms for review of administrative decisions. It is silent concerning the procedures that should be followed by agencies when they make rules. We cannot over-emphasize the importance of a standardized administrative procedure in Ethiopia such procedure regulation No. 77/2002 will ensure consistency, regulatory and fairness in administrative decision making¹⁶.

1.2. Definition of administrative agencies, modes of establishment and their power

1.2.1. Definition of Administrative Agencies

According to the Ethiopian Federal Civil Service law proclamation No. 515/2006 ‘Agency’ means “The Federal Civil Service Agency or general director respectively¹⁷”. On the other hand scholars define the term ‘agency’ in different ways: according to Breyer Stewart. “Administrative

¹⁵ Ibid P. 43-45

¹⁶ Cited at No 9 P. 45

agency” is an authority of government other than a court or legislative body, with power to make and implement law in these various ways¹⁸”.

According to the other writers the federal administrative act of America

defines administrative agency as a government authority, other than a legislative body or court which has the power to affect the rights of private parties either through the formulation of rules or through adjudication¹⁹.

From the above definition we can understand that, “administrative agency” is purpose oriented. The word by listing the name of the institutions that they are considered as administrative agencies or by excluding some specifically mentioned institutions from the general category of the executive branch of the government, and for our issue, we shall try to see some of these definitions and then we will develop our own definition of the term. The most acceptable definition of the word is that of the Federal Administrative act of America defines administrative agency as a government authority, other than a legislative body or court, which has the power to affect the rights of private parties through the formulation of rules or through adjudication²⁰.

As the definition, the administrative agency is with the executive branch, under it, every governmental organization outside of the legislative court is administrative agency. From the administrative agencies, which are the subject matters of administrative law, are only those administrative authorities that affect private rights and obligations²¹.

the Federal Civil Servant Proclamation No. 515/2006 p. 3536 Article 2/7/

¹⁸Cited at No. 4 P. 1

¹⁹Cited at No. 1 P. 4

²⁰ibid P. 4

²¹Berrard Sch Wartz Administrative Law 5th Edition P. 48

According to that definition, the organs of the executive branch enable to possess some combination of governmental powers and that exist outside of the legislative and the courts is an administrative agency²².

In Ethiopia, we don't find a precise definition of administrative agency owing to the absence of over organized and systematized administrative law²³.

However, Ethiopia's administrative agencies are empowered to exercise the three basic functions of the government, to legislate, execute, and adjudicate cases that are related to their own main function.

1.2.2. Mode of establishment of administrative agencies.

Administrative agencies are creatures of the law or statute for the reason that they come in to existence as a result of specific "enabling legislations." There are, three modes through which administrative agencies could come in to existence. Provisions of the constitution of different states may directly create administrative agencies. Such as Articles 101 to 103 of the FDRE Constitution, establish namely the Auditor General, the Electoral Board and the population census commission. Agencies could also be established by proclamations issued by legislative organ of the government, for instance by proclamation No. 471/2005 32 ministries are established the executive organ might also be empowered to establish different agencies in order to see to it that specific laws and policies are properly implemented. For instance, Art 77/2/ of the FDRE constitution empowers the council of ministers to determine the organizational structure of ministers to determine the organizational structure of the Federal ministers and other federal administrative agencies responsible to the ministry and it coordinates

²²Ibid

their activities and provides leadership. Thus, administrative agencies are established by constitution, proclamation and regulation^{23 24}.

1.2.3. The Power of the administrative agencies

A great many of the powers and duties of governmental agencies, whether they are part of central or of local government are laid down by statute^{23 24 25}. Administrative power is a legally conferred or expressed power and on the other hand recognized or implied power, capacity to create, alter, diverse and direct the right or duties in connection to certain public bodies or private person. In the modern administrative agencies the tripartite powers and functions of government are blended in one. In other words, administrative agencies may have legislative, judicial and executive powers²⁶, to implement its function.

In principle the legislative and the adjudicating powers should not have been assumed and exercised by administrative agencies. However, in a various pragmatic reasons administrative agencies are delegated to exercise it, and all the three powers of agencies involve discretionary powers²⁷. By these the given power executive organs are affecting the right of private parties through its adjudicating or rule making process.

But, most of the time, the agencies power is the fundamental of the executive branch of the government organs. These powers comprise organizing, directing, supervising, licensing, standardizing, investigating and discretionary power. Discretionary power is a power to option or teaching at a decision mechanism of controlling discretion. Their powers are concerned with the treatment of particular situations and are most of

²³ Cited at No. 1 P. 4

²⁴ Cited at No. 1 P. 10

²⁵ Peter Cane an Introduction to Administrative Law 3rd Ed. P. 348

²⁶ Cited at No. 1 P. 17

²⁷ Cited at No. 9 P. 51

the time devoid of generality. There is no procedural obligation of collection of evidence and weighting agreements are imposed on agencies whenever they exercise these powers²⁸. Decisions are made solely on the grounds of subjective satisfactions, policy consideration and expediency.

Administrative powers and duties assumed and exercised by administrative agencies vary from agency to agency. All institutions are endowed with several administrative powers and duties. That are according to Stewart and Breyer administrative functions discharged by administrative agencies can be classified in to four broad categories that overlap in a given cases. These are regulation of private conduct, government exaction, disbursement of money or other commodities and direct government provision of goods and services²⁹.

To carry out these functions administrative agencies employ a great variety of sanctions, incentive and other tools. In programs involving disbursements and direct government provision of goods and services, the authority to spend money is a basic tool of administration³⁰.

In other instances such as police protection and person administration force is involved. The richest mix of sanctions and incentive is also characteristically found in regulatory programs with the growth of administrative process. Nowadays, administrative legislation has assumed tremendous proportions and importance. In this time the bulk of the law that governs people comes not only from the legislative but also from the administrative agencies. The fact is that direct legislation of the parliament is not complete without rules and regulations. Therefore, administrative agencies deserve specific attention in the study of the

²⁸ IP Massey Administrative Law 4th Edition P. 45

²⁹ Cited at No. 4 P. 5

³⁰ Cited at No.4 P. 3

subject matter³¹. (Next to this, the writer discuss about the concept of the civil service in general.)

1.3. The concept of the civil service in general

What is Civil Servant?

According to Bradely and Ewing, departments which control government agencies are staffed by administrative, professional, technical and other official who constitute the civil service staff the departments of central government. For the purposes of inquiry by civil servant commissions, civil servants have been defined as “servants of the independent government institution or agency, other than holders of political, judicial, offices, ministers, and members of armed forces who are employed in a civil capacity and whose remuneration is paid wholly and directly out of moneys voted by parliaments³². And Derek Robinson, defined the civil service as employee of central government engaged in central administration of the state or non-commercial activities³³.

From the above definition we can understand, the precise legal nature of relationship of the civil servants with the agency. It is an important constitutional principle that those concerned with the administration of government departments should in fact enjoy tenure of office by which they may serve successive ministers of different political parties. The size and expense of the civil service have become a matter of political controllers. But without the service, the achievements of modern government would have been impossible³⁴.

³¹ Cited at No. 4 Page 3-5

³² H.W.R. WADE ACLDFNA Administrative Law 5th edition P. 52

³³ Derek Robinson Civil Service pay in Africa, International Labour Office, Geneva Published 1999 P. 7

³⁴ Cited at No. 7 P. 273

Although the civil servant law is constantly concerned with the acts of government departments decided up on the majority of cases by civil servants, the effectiveness of civil servant administration depends on the quality and motivation of its members³⁵. In addition, what the civil servant has to bear in mind is that apart from ministers who come and go with the tides of politics, government departments consist almost wholly of permanent career officials³⁶.

As to Ethiopia, the term "Civil Servant" shall have the meaning prescribed in Arts 2/1/ of the proclamation of the civil servant law No. 515/2006 a person employed permanently by federal government institution and shall exclude:

- a. Government officials with the rank of state minister, deputy director general and their equivalent and above.
- b. Members of the House of People Representatives and the House of the Federation.
- c. Federal Judges and prosecutors.
- d. Members of the Armed Forces and the Federal Police including other employees governed by the regulations of the Armed forces and the Federal police.
- e. Employees excluded from the coverage of this proclamation by other appropriate laws³⁷.

From the above discussion, the writer understands that civil servant means of all and other except Art 1 sub / a-e / government official employ are civil servants. To administer the civil service to come to our country the term civil service the Ethiopian central personal agency of C.P.A. or the civil service commission was established by order no. 23 of 1961, to

³⁵ Cited at No. 10 P. 51

³⁶ Abra Jenbere Unpublished Administrative Law P 49

³⁷ Cited at No. 17 Art. 2/1/

maintain homogenous civil service. But, now by structuring of the federal system, it is changed by federal civil service agency. The administrative agency is interested with administrative quasi-legislative and quasi-judicial power³⁸. Under the civil service agency established quasi-judicial organ, which deals with the civil servants matter in relation dispute and to render appropriate disciplinary measure to build up good work environment³⁹.

1.3.1. Power of decision making in the civil service

When parliaments authorities acted new forms of social service or state regulation, it is inevitable that questions and disputes will arise out of the application of the legislation. There are three main ways in which such questions and disputes may be settled: by conferring new jurisdiction on one or other of the ordinary courts, by creating new machinery in the form of special tribunals and by empowering the appropriate minister to make the decisions⁴⁰.

In the inquires case, the parliament may be contented with the normal process of departmental decision or may require the minister or the department to observe a special procedure. For example to hold a public inquiry, before the decision is made. There are important distinctions to be drawn between decisions made by a tribunal and departmental decisions involving a public inquiry. The appearance of tribunals as part of the administrative structure is deceptive, for typical tribunal exercises functions, which are essentially judicial in character, although of a specialized nature⁴¹. Finally, most tribunals could today be regarded as specialized courts.

³⁸Cited at No. 36P. 49

³⁹Ibid

⁴⁰Cited at No. 7 P. 702

⁴¹ Ibid P. 702

We consider that tribunals should properly be regarded as machinery provided by parliament for adjudication rather than as part of the machinery of administration. The essential point is that in all these cases the parliament has deliberately provided for a decision outside and independent of the department concerned⁴².

On the other hand, the public inquiry, while it grants citizens affected by official proposals some safeguard against ill informed as unreasonable decisions, is essentially a step in a complex process, which leads to a departmental decision for which a minister is responsible to the parliament⁴³.

Currently there are about five administrative tribunals in Ethiopia. These are the tax appeal commission, the labour relation ship board, the social security tribunal, the urban land clearance matters tribunal and the civil service tribunal. From those the Ethiopian civil service tribunals which only one tribunal is established, under proclamation No. 515/2006 Art 74 as provide and its decision are appeal able to the Supreme Court on pointsof law. Tribunals and inquires are both part of ordinary structure of administrative justice.

This is the purpose that disciplinary codes systems are designed for and in pursuing it, an attempt is made to reconcile a number of different requirements. There is a need to protect the employee against the risk of arbitrary actions on the part of the employer of the employee and the need to ensure that the administration runs smoothly in the interest of efficiency and of the community and at the same time to provide guarantees of fair treatment for its officers⁴⁴. This power enables the superior to issue orders to subordinates within the limits of his

⁴²Ibid

⁴³Ibid

jurisdiction, to have these orders carried out and supervise their application and to impose sanctions if they are not obeyed.

1.3.2. The concept of disciplinary measure in the civil service

The word discipline comes from the word disciple. It is important to differentiate between discipline and disciplinary. The latter is what we take when discipline has failed disciplinary action, are taken by management in response to an employee's failure to meet standards, objective or rules of the organization⁴⁵.

According to Blacks law dictionary, disciplinary proceedings are proceedings which are brought against attorney to secure his or her censure, suspension or disbarment for various acts of un professional, conduct, most status have procedural rules governing such proceedings in including disciplinary rules for attorneys⁴⁶.

Hence, discipline does not mean blind obedience; any agencies should first establish discipline breach, and legal administrative measures maybe taken. But, in taking disciplinary measure it has to be done in accordance with the law and the established disciplinary proceedings and must observe the rights of the employee's who are subject to the measure.

As, mentioned in the above discipline it is the expression in legal terms of that power which every superior is given over each one of his subordinates to ensure the smooth and effective functioning of the administration. This power enables the superior to issue orders to subordinates within the limits of his jurisdiction, to have these orders

⁴⁵ Internet Website

⁴⁶ Blacks, H. Cambll, Blacks Law Dictionary 1 edition P. 464

carries out and supervise their application, and to impose sanctions if they obeyed. Discipline is also something more than carried out orders⁴⁷.

To come to our countries according to proclamation No. 515/2006 Art 69 a government institution shall establish a disciplinary committee to which hears, litig acts and to recommend and submit to the head of a government institution. A disciplinary measure maybe taken in accordance with the civil servants proclamation and regulation No. 77 / 2002 as provided.

CHAPTER TWO

2. The civil servants law related to disciplinary measure under proclamation No 515/2006.

2.1. The Right and duties of the Civil Servants

The rights and duties of the civil servants between employer and employee are correlated are to each other; the right of one is the duty of the other in other words; it can be seen as the other side of the same coin. This relationship is governed by law proclamation No. 515/2006.

2.1.1. The Right of Civil Servants

The civil servants have many rights under the civil servants law and their rights are as follows:

- Objective of Promotion¹. Shall give, for enhancing the performance of government institution to motivate the employees.
- The right to transfer and reassignment².
- Getting annul leave³. As it is including the constitution, civil servants should refresh their mind for the next task and work. It is giving twenty days for first year and one more day for each one service years, but cannot more than thirty days. .
- Taking performance evaluation in a transparent manner.⁴
- Maternity leave⁵. Also it is interrelated to the women human right. It is giving thirty days before confinement and sixty days after confinement and other leaves as may be recommended by physician.

¹ The Ethiopian Civil Servant Law Proclamation No. 515/2006 Art. 23

² Ibid Art. 26-30

³ Ibid Art. 36-40

⁴ Ibid Art. 31/2

⁵ Ibid Art. 41

- Sick leave.⁶ The total is eight months three months with full pay, three months with half pay and two months with out pay of salary.
- Leave for personal matters⁷.
- Special leave with out pay⁸. It can be seen as an exception to the rule; the rule is getting overall leave.
- To oppose the deduction of his/her salary with out court order, the law or his/her consent /Art 10 of proclamation No. 515/2006/
- Medical Benefit⁹ Healthy person is important not only for himself but also for the society and for the public office in particular. Therefore, it is necessary that they get adequate medical benefit.
- Occupational safety and Health.¹⁰
- Getting certificate of service¹¹
- Getting severance pay¹²
- Getting the disability pension and gratuity¹³
- The right of exemption from tax¹⁴. Occupation safety and health, the right of exemption from tax (as far as the disability pension and severance pay is concerned) getting certificate of service and the like rights are part and parcel of the civil servants.
- The right to get information contained in the personal records or to have a copy of it¹⁵.
- The right to get training¹⁶.

From the above mentioned rights, we can understand that the administrative agencies recognize the employee's need and in return

⁶ Ibid Art. 42

⁷ Ibid Art. 43

⁸ Ibid Art. 45

⁹ Ibid Art. 46

¹⁰ Ibid Art. 47-56

¹¹ Ibid Art. 87

¹² Ibid Art. 88

¹³ Ibid Art. 54

¹⁴ Ibid Art 55

¹⁵ Ibid Art. 59(1)

¹⁶ Ibid Art. 57-58

want employees perform their job in good manner. By creating workable environments, by giving clear instructions, by observing and evaluating every ones work periodically and by praising a job well done, they reinforce each employee self control and self respect, and create a well disciplined atmosphere by avoiding and preventing typical cause of discipline problems¹⁷.

2.1.2. The Duties of Civil Servants

1. According to Art 61 sub /1-5/ of the proclamation No. 515/2006 Civil

Servants are expected to:¹⁸

Sub. Art 1. Be loyal to the public and the constitution:

Sub Art 2. Devote his whole energy and ability to the service of the public.

Sub Art 3. Discharge the functions specified in his Job description and accomplish other tasks ordered legally.

Sub Art 4. Observe laws, regulations and directives related to the civil service.

Sub Art 5 Have a duty to performance government policy efficiently.

Although this is mentioned as a duty of the civil servant, the government agencies as an employer and responsible person, must do its level best activities by observing all laws related to public service (civil service) and give training, workshop, seminar etc. for it's employee (civil servants) in this case it can be seen as the duty of both parties.

As far as policy is concerned, the writer believed and argued that this is impose between to be one of the duties of the worker or the civil

¹⁷ Internet Website

¹⁸ Cited at No. 1 Art. 61/1-5/

servant because any policy is the general direction or out of certain state or government.

2. According to Art 62 have ethical conduct¹⁹.
3. According to Art 63, submit for compulsory medical examination except for HIV Aids²⁰.
4. According to Art 64, properly handle property of the agency²¹.
5. Liable for intentional/negligent loss of property²².
6. Promptly inform the concerned official of any situation, which he may have reason to believe, could present a hazard²³.

From the above mentioned duties a civil servants or who is employed in any one of the government agencies is expected to do his job effectively, efficiently and he/ she should follow certain rules, regulations which govern their performance on the job, use of equipment and materials, safety and health standards and acceptable conduct. On the other hand, it is a duty of every employer or the government institutions to ensure so far as is reasonable and practicable the health safety and welfare at work of all his employees. And under Art 61/3/ as provided the term accomplishes other tasks ordered legally²⁴. It is more technical and more generalized and needs some professional clarity.

2.2. The Power of the Head of the Government office and disciplinary measure

Before dealing with the power, the writer will discuss the definition of the term "Head of a government institution". According to Art 2/8/ of the Federal Democratic Republic of Ethiopia Civil Servants law proclamation No. 515/2006 "Head of a government institution" means a government

¹⁹Ibid Art. 62

²⁰Ibid Art 63

²¹Ibid Art. 64

²²Ibid Art. 65

²³Ibid Art. 48/2/ C.

²⁴At. 61/3/

official who directs the institution and includes his deputy²⁵. The given powers of a Head of government institution are:-

1. The power of establishing a disciplinary committee, which shall investigate disciplinary charges, brought against civil servants and there by submit recommendations to him or his deputy²⁶.
2. The power to assign the chairperson two of the members and the secretary²⁷.
3. The power and responsibilities to take disciplinary measures a civil servant who has committed grave disciplinary offence entailing fine not exceeding three months salary, down grading or dismissal depending on the severity of the offence²⁸.
4. Approval of the recommendation of the disciplinary committee or where he has good reasons; ²⁹
 - a. To decide other wise or
 - b. Order the committee to further investigate the charge

From the above-mentioned power of the head of government institution related to a disciplinary measures that, "the head of a government institution and his deputy" are empowered to approve the recommendation of the disciplinary committee or to make a decision. In other words, the head of the government institution is empowered to give a unique decision from the recommendation of the disciplinary committee. In addition to this, the administrative agency is a party to a dispute and decision-making organ at the same time or the organ is a Judge in his own case. This would have a negative impact on a favor of impartial decision of the disciplinary measures.

²⁵ Ibid art. 2/8/

²⁶ Ibid Art. 69/1/

²⁷ The Federal civil servant Grievance and disciplinary Procedure No. 77/2002 Art. 23/2

²⁸ Ibid Art. 4

²⁹ Ibid Art. 20/21/a-b/

Generally, administration sanctions are given as oral warning, which are imposed by the immediate superior in the service³⁰, and sanctions one degree heavier or written warning imposed by the concerned official having a rank out lower than the division head³¹. Rigorous penalties are imposed by the head of the government institution or his deputy³². It implies that, the head of the government institution or his deputy have a discretionary power in the disciplinary decision making process.

2.3. Overview of the disciplinary committee

2.3.1 The composition of the disciplinary committee

Before dealing with the composition of the disciplinary committee the writer, begin the discussion from the establishment of the discipline committee. According to the current civil servants proclamation No. 515/2006 and regulation No. 77/2002 as provided, "Any government institution shall establish a disciplinary committee that conducts formal disciplinary inquiry and submits recommendations to the head of a government office³³. The members of the committee are five in number and it shall have a chairperson and a secretary. Moreover, they assigned as follows:-

- The head of a government office shall assign the chairperson, two of the members and the secretary of the committee and two members of the committee should be elected by the general meeting of the civil servants of the government office³⁴.

³⁰ Cited at No. 27 Art. 3/2

³¹ Ibid Art. 3/2/

³² Ibid Art. 3/3/

³³ Cited at No. 1 Art. 69 and cited a No. 27. Art. 22

³⁴ Cited at No. 27

From the above provisions, we can understand that the disciplinary committee members must be composed from the civil servants and the head of the agency³⁵. However, most of the committee members are appointed by the head of the government office. This implies that, the impartiality of the disciplinary committee members is questionable. In addition to this the regulation considered as a quorum where the chairperson and two other members are present at meeting of the committee³⁶

Here it has to be noted that, in quorum the two members of the committee may be those assigned by the head of the institution or the elected representative of the civil servant, it is not clearly provided or it need some clarity. Because civil servants have the right to have a representative present, and they must be given the opportunity to refute the information or to present mitigating evidence.

2.3.2 The power and Role of the disciplinary committee

2.3.2.1 The power of the disciplinary committee

According to the Federal civil servants proclamation No. 515/2006 and Disciplinary and Grievance procedure council of ministers regulations No. 77/2002, the power of the disciplinary committee is as fallows:

- A government institution shall establish a disciplinary committee, which shall investigate disciplinary charges brought against civil servants, and there by submit recommendations to the concerned officials³⁷. To do this the disciplinary measures may be taken irrespective of any court proceeding or decision³⁸ and the report

³⁵ Ethics and accountability in Africa Public services Edited by Sading Rashed and Dele Olowee First Edition 1993 P. 234

³⁶ Cited at No. 27 Art. 26/2/

³⁷ Cited at No. 1 Art. 69

³⁸ Ibid Art. 69/2/

required to be proportional to the imposing rigorous disciplinary penalties³⁹, depending on the gravity of the offence. The other important point is the term of office of disciplinary committee members, which is two years⁴⁰. And the committee meets frequently for discharging its duties, its quorum and majority vote under its power.⁴¹

On the other hand, any member of the committee who has been proved to have a quarrel with the accused person or to related to him by consanguinity or by affinity, shall be removed or may be dismissed from membership. Because he may disclose secrets involving cases under inquiry or obstruct in any manner the activities of the committee he fail to meet the requirements of membership⁴².

In addition to this according to regulation No. 77/2002 Art 25 as provided the term of office of disciplinary committee members should be two years. But the submission of the recommendation or decision of the disciplinary committee has no limited range of days. It implies that the disciplinary committee may not accomplish one case in the given term of a disciplinary committee. In other words, the disciplinary committee is not bound to report one case periodically.

Therefore, the power of the disciplinary committee shall be subject to the law, to apply the necessary procedures. It means, its power is limited by the civil servants proclamation No. 515/2006 and regulation No. 77/2002. Acting out of the provisions of the civil servants proclamation and regulation may the result would be dismissal from membership.

³⁹ Ibid Art. 68/2-14/ and Art 67/1

⁴⁰ Cited at No. 27 Art. 25

⁴¹ Ibid Art 26/1/3/

⁴² Ibid Art. 27/1/2

2.3.2.2 The Role of the discipline committee in the decision making process.

The decision-making process of the discipline committee is as provided in the Federal Civil Service Disciplinary and grievance procedural regulation No. 77/2002.

The disciplinary committee shall bring the charge together with copies of evidence attached therewith and summon him to appear with his statement of defenses and the summons shall indicate the place, date and time of the hearing and shall be served at least ten days before the date of the hearing. In addition to this, where the charge could not be served either because the whereabouts of the accused is unknown or he is unwilling to receive it. The summons shall be posted on the notice board of the government office for fifteen days⁴³. The purpose to do so is to ensure the fundamental constitutional right of hearing and defending him before the courts of law (although it is the quasi judicial).

However, the disciplinary committee shall submit recommendation on the dismissal of the charge to the head of the government office where it upholds the objection, or order the accused to submit his statement of defense, where it dismisses the objection⁴⁴.

Where the accused admits the charge, the disciplinary committee shall, unless it finds it necessary to make further investigation, examine the charge and the statements of the accused and there by give its recommendation. Where the accused denies the charge, the disciplinary committee shall investigate the charge by hearing the testimony of witnesses of both parties and by examining the documentary evidence⁴⁵.

⁴³ Cited at No. 27 Art. 11/3/

⁴⁴ Ibid Art. 12/2/

⁴⁵ Ibid Art. 14

But, the witnesses of the disciplinary committee are not responsible for their testimony. Because a testimony given without moral duty will not respect persuasive testimony.

In addition to this, the disciplinary committee shall require the concerned body to produce copies of documentary evidence or summoning of witnesses⁴⁶. The parties have right in disciplinary hearing should be conducted fairly. Such as the employer is able to outline case against the employee and the employee is given the chance to defend the allegations or his actions. The employee must be given time to consider his position and prepare any defenses to the employer's claims.⁴⁷

In the name of a fair hearing adequate time to prepare one's case in answer, access to all material relevant to a case right to one's case orally, in writing or both, the right to examine and cross-examine witnesses. The right to be represented, the right to have one's case decided solely in the basis of material- which has been available to the parties, the right to a reasoned decision which takes proper account of the evidence and answers of a case⁴⁸. To sum up, the disciplinary measures, ethical rules to be designed to ensure the principles of impartiality, objectivity, integrity, efficiency and discipline of public servants when exercising adjudicative powers⁴⁹.

After the conclusion of the inquiry, the disciplinary committee shall submit it to the head of a government institution a report on the findings of the inquiry and its recommendation. Where the accused is found guilty at the conclusion of the inquiry, the recommendation of the disciplinary committee shall indicate the penalty to be imposed. The gravity of the offence and the circumstances under which it was

⁴⁶ Ibid Art. 15 and 16

⁴⁷ Jance Nairence Employment Law for Business Student First Published 1999 P. 156

⁴⁸ Peter Cane an Introduction to administrative law P. 161

⁴⁹ Cited at No. 35 P. 25

committed, the commendable ethical conduct and accomplishment of the accused manifested in his past performance and, the past disciplinary records of the accused, and where the accused is found not guilty at the conclusion of the inquiry, should be provided with a letter evidencing his acquittal⁵⁰.

From the above analysis of the role of the disciplinary committee we can understand that the disciplinary committee must discharge their duties in compliance with rules laid down in the constitution, proclamation, regulation and policies of as concerned. In addition to these expected to them, to required to satisfy the obligation to give fair hearing and natural Justice and their recommendation must be persuasive to both parties. To decide and to improve the quality of complex decisions making process, the committee members must be familiar with the civil servant law, which apply to the initiation of the disciplinary process and to facilitate the accused employee due process rights⁵¹. From the point of view the role of disciplinary committee is not an easy task it implies that, the disciplinary committee members expecting to have skills, knowledge or professional competence in addition to other professions, to adjudicate uniform, fair and persuasive decisions for both parties and the audience.

But, under our civil servants law, disciplinary committee members are not required to be lawyers or are not required to get legal training. In the absence of legal skill and knowledge they cannot frame the necessary issues, they cannot determine the relevant and the non-relevant evidences and they cannot exclude the non-essential and irrelevant facts in the decision making process. In the role of decision making the principle of due process is very important to make administration decisions fair, accurate and respect human dignity.

⁵⁰ Ibid Art. 19

⁵¹ Cited at No. 17

2.4. Accountability and Responsibility of the administrative decision maker

Accountability is a prime, enduring ethical value required of all the public servants, and responsibility is too. It means accountability and responsibility are two faces of the same coins. Above all, without the two, there is no good governance. Not only had the question of good governance but also as it provided, in Art 13 of the FDRE constitution. Any public officials are accountable for any failure in official duties^{52 53}.

During the process of decision, evaluating employee performance is often a very challenging task and it is the most important responsibility of a decision maker. It helps to correct or eliminate inappropriate behavior or conducts of the civil servants.

According to the Ethiopian Civil Servants proclamation No. 515/2006 of Art. 66 "the objective of disciplinary penalty shall be to rehabilitate a delinquent civil servant when he can learn from his mistakes and become a reliable civil servant or to discharge him when he becomes recalcitrant"⁵³. Also, in a democratic system of government, public servants must account to their superiors /at all levels in the hierarchy/ for their superiors/ at all levels in the hierarchy for their official actions and in actions. In addition, they must accept the responsibility for the authorized acts of their subordinates they should not volunteer to superior officers any identification of the persons to blame⁵⁴. And according to Sadig Rasheed and Dele Olowu, accountability is a very important for the activities of an instruction. It is to mean that, every public servant is required to endure ethical value, and each person is

⁵² The FDRE Constitution Art. 12/1/ and 2

⁵³ Cited at No. 1 Art. 68

⁵⁴ Cited at No. 35 P. 27

responsible for his/her actions and accountable for his own deeds and misdeeds⁵⁵.

To sum up accountability implies that all government officials are responsible to externally imposed principles and standards of behavior and to external sources of authority designed to control their conduct under normal circumstance.

There are certain values and standards of performance that are intended to guide and regulate administrative decision-making. Such standards and values need to be backed by enforcement machineries, institutions and procedures to secure compliance with the standards⁵⁶.

From the above all argument mentioned we can understand that the civil servant decision maker is responsible and accountable for his/her acts, failure to meet the standards, objectives, or rules of the organization.

On the other hand, Sading Rasheed and Dele Olow contend that disciplinary procedures are not only cumbersome and outdated; they are weak and at times often make accountability and productivity improvements impossible. Civil service managers do not possess the capacity to hire and fire senior officials. In any case a large number of senior official are selected based on seniority rather than meritorious performance or worse based on their political loyalty or ethnic background⁵⁷.

From the above two different arguments the civil servant law have a lack of clarity with the accountability and the responsibility, when the decision maker made a failure in the decision making processes. Because the disciplinary committee members are only responsible for

⁵⁵ Ibid Page 8

⁵⁶ St. Mary's University College Administrative Law Module October 2004 P. 75

⁵⁷ Cited at No. 35 P. 234

disclosed, secrets obstructed the activities or failed to meet the requirement of membership in related to the disciplinary measure act. However, according to proclamation No. 515/2006 Art 90/2/ as provided an official or member of a committee who intentionally or negligently authorize unlawful appointment, promotion, salary increment or other benefits shall be liable under the relevant criminal and civil law. But the disciplinary committee who intentionally or negligently made unlawful recommendation, or violates the rules of faire hearing or violates the right of justice he is not liable of under criminal or civil law. Thus, according to regulation No. 77/2002 Art 27 as provided the disciplinary measure committee are responsible only for : disclosed the secrets , obstructed the activities or failed to meet the requirement of a disciplinary committee. The fail arty and the consequence of these are dismissals from member ship.

2.5. Reasons for imposing disciplinary action

According to the Ethiopian Civil Servant proclamation, No. 515/2006.

The following are list offences for which an agency head or delegated committee may take disciplinary action⁵⁸.

- To undermine one's duty by being disobedient, negligent or tardy or by nonobservance of working procedures;
- deliberate procrastination of cases or mistreatment of clients;
- To deliberately obstruct work or to collaborate with others in committing such offence.
- Unjustifiable, repeated absenteeism or non-observance of office hours in spite of being penalized by simple disciplinary penalties.
- To initiate physical violence at the place of work;
- Neglect of duty by being a local or drug addict;

⁵⁸ Cited at No. 1 Art. 68/1-14

- To accept or demand bribes;
- To commit an immoral act at the place of work;
- To commit an act of misrepresentation or fraudulent act;
- To inflict damages to the property of the government due to an initial act or negligence;
- Abuse of power;
- To commit sexual violence at the place of work, and to commit any breach of discipline of equal gravity with the offences specified under the above.

This implies that the civil servants misconduct is a broad one. The behavior or action of the civil servant constituting a breach of professional conduct can reside in the manner in which duties are discharged or in failure to discharge them as well as in the work committed, or in other words in omission as well as in commission. The civil servants misconduct is not readily definable from this angle either.

Whatever form it takes, a break of professional conduct can always be reduced. Nevertheless a failure to fulfill an explicit or implicit obligation, one that is laid down or one that derives clearly from prohibitions and other obligations mention that must be made of the whole field of breaches of professional conduct arising out of the responsibility placed on every official in the discharge of his duties. In addition to these if the agency has published work on administrative regulations or other policies to which the employee must comply, violations of these provisions may also be cause for disciplinary action⁵⁹.

From the point of view of the writer, disciplinary measures may be imposing implicitly. In addition to provided in the proclamation No. 514/2006 Art 68 rigorous disciplinary measure. It means the civil servants misconduct could be explicit and implicit. The implicit rules,

which the civil servants comply, violations of these may also be cause for disciplinary action. This implies reasons for imposing disciplinary actions cannot be restricted by law.

2.6. Disciplinary sanction and appeal procedure

2.6.1. Disciplinary sanction

Agencies are expected to follow effective disciplinary procedures. This can help to maintain good employee relations within the work place. A work place with out reasonable employer relations encourages absenteeism, low motivation, disloyalty and poor levels of performance and productivity⁶⁰.

The essential feature of a disciplinary sanction must relate to the offences in respect of both for its breach of professional conduct and the nature of the sanction. In other words the official must have committed an offence competed with the performance of his duties, and a disciplinary sanction affects his career. The imposition of sanctions drives from the civil servant of the official's individual responsibility, whether he breaks a rule in a particular case. Allows a break of the rules to be committed between the administration and the civil servant at large a civil servant who has incurred a sanction recognizes its twofold significance. To-wards the administration, which considers that he has been guilty of an offence, and towards the civil servant: for disciplinary procedures can be often be instituted against an official merely or inefficiency brought by a head of the administration⁶¹.

Proclamation No. 515/2006 and regulation No. 77/2002 shows that the position is much clearer for disciplinary sanctions than for offences. The most usual sanctions are warning, fine sanction, down grading and

⁶⁰Ibid

Cited at No. 27 Art 6/1/

dismissal. The sanctions are classified simple and rigorous penalties. Where the penalty is simple, its record remains for two years and, where the penalty is rigorous, its record remain for five years according to Art 68/5/ of Proclamation No. 515/2006.

2.6.1.1. Warning

The purpose of a warning is to 'punish' the employee for his past mistakes, but also to encourage him not to breach any rules in the future⁶². This sanction, also known as rebuke, reprimand or admonition, is the first and lightest, clearly provided in regulation No. 77/2002 this is initial sanction is two types in the civil servants disciplinary and grievance procedure those are oral warning and written warning.

Concerned official having a rank not lower than a division head can give a written warning. A warning whether verbal it is or written is given directly to the offender. The written warning will be attached to his personal file. A written warning is a disciplinary action more appropriate for violations of employee work rules or employee performance due to "unwillingness" rather than "Inability". The written warning should include the employee statement regarding the problem; the specific courses of action you expect to be taken by the employee in the future, and a statement of additional action that will occur if a violation of the rules or standards is repeated⁶³. According to Art 67/2/ of proclamation No. 515/2006 the penalties of oral warning and written warning, fine up to one month's salary, shall be classified as simple disciplinary penalties. In addition to this according to proclamation No 515/2006 with Art 73/7/ and Art 75/5/ cumulative reading provides simple disciplinary measures are applicable to the grievance handling committee. On the other hand in accordance with Art 29 of regulation No. 77/2002. the

⁶² Cited at No. 47 P. 158

⁶³ Cited at No. 35

grievance committee has no right to investigate simple penalties.

Implementation the provisions of the proclamation it needs clear and its own procedural provisions.

2.6.I.2. Financial sanctions

It is often difficult to draw a line between administration and financial sanctions. Those considered below certainly affect administration but from the very stress the financial motive. It includes fines, deductions from salary, delayed promotion to a higher step, transfer to a lower step or loss of rank. They are, it would appear, less usual than the penalties considered so far⁶⁴.

The use of fines as a disciplinary sanction is, as a rule, it may be said that, where it occurs, it is considered a penalty for minor offences. There is also a marked tendency for legislation to limit the amount that the penalties shall be classified⁶⁵. By the way according to proclamation No.

515/2006 Art 10 sub Art 1/a-c/ the salary of a civil servant may not be attached or deducted except with the written consent of the civil servant, by court order and as the provisions of the law. The monthly deductions from the salary of a civil servant to make pursuant to sub 1/ b and c/ by court order and as the provisions of the law shall not exceed one third of this salary. On the other, hand the monthly deductions from the salary of a civil servant to make pursuant to sub 1/a/ with the written consent of the civil servant. Its maximum is unknown which means the agency can attach or deduct the full salary of the civil servant. And according to Art.67 of this proclamation fines up to one month's salary shall be classified as simple disciplinary penalties and fine up to three month's salary shall be classified as rigorous penalties⁶⁶. Simple fine penalties

⁶⁴ Cited at No. 59 P. 27

⁶⁵ Ibid P. 28

⁶⁶ Ibid Art 67/1/ and 2

may give directly by the head of administrative office⁶⁷ or may be it recommended by disciplinary committee and approved by head of administrative⁶⁸ or by the head of the government office⁶⁹. Simple fine penalties review in the administrative office by grievance committee⁷⁰ or it is not applicable for the civil servants administrative tribunal.

2.6.I.3. Down grading

Down grading, have much greater financial consequences than a fine more over. It remains in effect for a variable period, which may be years.

In addition to its effect suspension to increments may be a heavy penalty, for an increment stopped is an increment lost and its amount over a whole career may be substantial. The last kind of financial penalty is called downgrading, it is that affecting step depends on various factors of which time is an important one: officials must wait a certain time before moving up step⁷¹.

Which means reeducation of seniority at a given step increases the time an official must stay at that step, during which he gets no salary increment. Mention should be made of salary deductions, not specified as disciplinary sanctions, that may be made to compensate for material prejudice caused to the civil service⁷².

Depending on the gravity of the offence down grading may be imposed on a civil servant for a breach of discipline. These penalties only may be given recommendation by disciplinary committee and approved by the head of a government office. When a civil servant who has been noted in accordance with Art 67 sub 1/e/ of proclamation No 515/2006 down

⁶⁷Cited at No. 27 art. 3/3/

⁶⁸Ibid

⁶⁹Ibid Art. 4

⁷⁰Cited at No. 1 Art. 73/7

⁷¹Cited at No. 17

grading up to the period of two years and up on the laps of his period of punishment shall be reinstated. To a similar available vacant post without any promotion procedures or in the absence of a vacant post, he shall be reinstated to a similar post without any promotion procedures, when it becomes available later time. According to Art 67 sub Art 5/6/ of this proclamation after a down grading disciplinary measure has been taken on a civil servant, such measure shall remain in his record for five years. Which means the consequence of the penalty of down grading is affected the promotion salary increment and other benefit of a civil servant up to the period of 5 years.

2.6.I.4. Dismissal

Before dealing with dismissal the writer, discusses some points about the purpose and types of penalties. The aim of disciplinary penalty shall be to rehabilitate a delinquent civil servant when he can learn from his mistakes and become a reliable civil servant or to discharge him when he becomes recalcitrant⁷³. The usual sequence and types of penalties are warning, fine sanction, down grading and dismissal. Dismissal is a stage four penalty, and obviously the most severe form of discipline⁷⁴.

The steps are so timed that the employee has the opportunity to correct the behavior prior to the next stage. The goal again is to apply the minimum level of discipline that will bring the employee's performance up to expected levels⁷⁵. If conduct or performance is still unsatisfactory and the employee still fails to reach the prescribed standards, dismissals will normally result⁷⁶.

⁷³ Cited at No. 1 a Art 66

⁷⁴ Cited No. 47 Page 159

⁷⁵ Cited at No. 17

⁷⁶ Cited No. 47 P. 153

It means when the employees behavior has not improved, the systems organized to take additional disciplinary action. However, a serious first offense may justify imposing a heavy penalty, such as down grading or dismissal. The employee maybe dismissed for any of the reasons of offences listed⁷⁷.

According to proclamation No. 515/2006 Art 84, the service of civil servants shall be terminated where⁷⁸:

- a. A disciplinary penalty under sub-Article 1/f/ of Article 67 of this proclamation dismissal is imposed on him and
- b. The penalty is not revoked on appeal and according to Art 14/1/ sub-Article/d/. As provided a civil servant who has dismissed on grounds of disciplinary offence before the lapse of five years from the date of dismissal cannot be eligible to be civil servants. On the other hand, the civil servants have a right to get certificate of service. Where the service of a civil servant on the service is, terminate for any reason only indicating the type and duration of service as well as his salary. /Art 87 of proclamation No. 515/2006/

As mentioned above the government institution guide proscribes minimum and maximum sanction for each offence. The system of sanctions is generally more detained and exact than the list of offences and possible sources of an offence not always clearly defined. Normally, when the disciplinary committee and the head of the government office, applying disciplinary action have adjudicative powers and violations of natural Justice is unfair dismissal. In addition to this accordance with Art 87 where the service of a civil servant on service is terminated for any reason or where he so requests, he shall be provided with a certificate of

⁷⁷ Cited at No. 1 Art. 68

⁷⁸ Ibid Art. 84

service indicating the type and duration of service as well as his salary. In the cumulative reading of art 87 and Art 14/d/ the enforcement mechanisms are needs some clarity.

Therefore, the disciplinary committee and the head of a government office or employers must use disciplinary procedures fairly, when imposing disciplinary sanction by using their adjudicative powers.

2.6.2. Appeal procedures

Appeal procedures are not differentiating from the process of disciplinary decision. The process sometimes includes a possibility of reconsideration, revision, and appeals to higher authority cancel or mitigate the sanction at its discretion. The appellate administrative Tribunals Judgments are final, except the appeal may make on basis of fundamental legal error if any, to the federal Supreme Court⁷⁹.

On the other hand, simple disciplinary penalties, oral warning, written warning and fine up to one month's salary is appealable to the matter's of a grievance handling committee⁸⁰.

Which has the advantage that both the disciplinary and the grievance committee decisions are made simply, and quickly, but gives no guarantee that the final decisions of the grievance committee will be independent?. As it is obvious that it is indicated in Art 75/5/ and 75/7/ cumulative reading all out of a simple discipline other facts which were observed and investigated by the grievance committee are appealable for the administrative Tribunal⁸¹. Nevertheless, rigorous disciplinary penalty is appealable to the administrative tribunal⁸². However according to Art 37 Sub Art/1, 2 and 4/of regulation No 77/2002 as provides a civil

⁷⁹ Cited at No. 59 Page 51-52

⁸⁰ Cited at No. 1 Art. 73/7/d/

⁸¹ Ibid Art. 75/5/

⁸² Ibid Art. 75/2/

servant shall clearly indicate the grounds of the appeal and the redress sought. Appeal shall be barred unless submitted with 30 days from the date the decision is communicated to the civil servant in writing. Notwithstanding the above provisions, the civil servant may, within 15 days following the caesura of the force measure apply to the Tribunal for the leave to appeal out of time where the appeal is delayed due to proven force measure. Provided, however, that no appeal against a decision of dismissal or demotion may be accepted after 6 months from the date of the decision.

CHAPTER THREE

3. The problems related to disciplinary measure

The writer of this paper worked as clerk of disciplinary committee in the geological survey of Ethiopia. As a result, he has a chance to closely observe legal and practical problems related to disciplinary measures.

3.1. The problem related to composition

According to regulation No. 77/2002 Art. 23 as provided, the total number of the disciplinary committee shall have five members and a secretary. The composition of the disciplinary measure committee members should be assignee and elected as follows.

1. The chair person, two of the members and the secretary of the committee shall be assigned by the head of the government office and
2. Two of members of the committee shall be elected by the general meeting of the civil servants of the agencies. Which means, more of the members assigned by head of the government office. On the other hand, according to Art. 26 of the regulation as provided, any meetings of the committee shall be a quorum where the chair person and two other members are present and their recommendation of the committee shall be passed by a majority vote in case of a tie. Which means, the chair person and two of the committee members, who is assigned by head of the agencies, are in the meeting of the disciplinary committee, they can render a decision and their recommendation shall be passed by majority vote. In other words, in the absence of the civil servants representative disciplinary committee members, the remaining disciplinary committee members can make a final report. Such

type of composition will be danger to the impartiality of the decision-making committee for various reasons.

First of all, the disciplinary committee members are the employee of the agencies, their promotion, salary increment or demotion is evaluated by the head of the agencies. As a result, they may tend directly or indirectly to be influenced since the power to promote or appoint rested in the head of the agencies.

Secondly the accused civil servant would certainly have feeling that the decision of the one side represented committee might likely to be affected by reason that the members of the committee are dependent on agencies concerned by reason that the members of the committee are dependent on agencies related to appointment and promotion. Therefore, the composition and the quorum of the disciplinary measure committee, are affected by the impartiality and the concept of balancing the composition of the disciplinary committee members.

Not only this, according to Art 24 of Regulation No 77/2002, one of the requirement of membership is expected to have more than two years service in government office. In other words unless otherwise the civil servants has more than two years service in a government office the new establishing the government office is can not be establish a disciplinary committee. In addition to this, the term of office of the disciplinary committee members shall be two years, however, that they may be re assigned or reelected at the end of their term of office.

But the law is silent as to the term office of the reelected and reassigned disciplinary committee members. Most importantly, also seen in practice, the head of government agencies, would order all of the disciplinary committee members to extend for the indefinite period of time, which means the head of government office would order the representative of

the civil servants with out the consent of the civil servants in the general. To pursuant to this, I have attached one copy of decision related to the reelected and reassigned disciplinary committee members.

As in the above discussion, the composition of a disciplinary committee has more complicated problems in relation to the law and practice.

3.2. The problems related to the approval of the simple disciplinary penalties.

According to the civil servants law, proclamation No 515/2006, Article 69 provides that the disciplinary committee submits recommendation to the concerned official after it investigates disciplinary charges brought against civil servant. On the other hand, according to regulation No 77/2002, Article 20 authorizes the head of the government agencies to approve the recommendation of the discipline committee when examining the recommendation submitted under Art 19 of this regulation.

The writer, more emphasizes in the problem of the law and practices in the approval of simple disciplinary penalties, which the proclamation authorizes to be approved by the head of the administrative. On the other hand, the regulation is authorizes to be approved by the head of the agencies. Now a day in the government office, it is one of the reasons of practical problems.

For instance, if the disciplinary committee submits the recommendation of simple disciplinary penalties to the head of the government office according to Article 19 of the regulation and, the head of government office would approve the submitted report. And when the accused against the penalties and he may bring the case to the grievance committee in accordance with article 75/5/as 75/7 cumulative readings of the

proclamation. The grievance committee after the investigation of the case, the recommendation is submitted to the head of government agencies, then the head of government agencies again to approved his own the latter decision and his decisions final or not apple able. In the other words, the head of the agencies affect the principle of impartial decision. Which means the principles of independency and impartiality in a simple disciplinary case not applicable for all in the civil service justice system? However, independent and impartial tribunal one of which is called administrative tribunal. And it is the right of the civil servant to bring their case beforean independent and impartial tribunal, which should render just decision.

Therefore, any decision making body listed contrary to this right may be in violation of individual rights, then the civil service have an obligation to secure the independence and the approval of impartial decision in accordance with article 9/4/ and 13/1/ of the 1995 constitution.

3.3. Problems related to the witnesses testimony in the government office

According to the Ethiopia criminal procedure code of the Empire of Ethiopia of 1961, Art 136/2/ is indicated that the witnesses and experts shall be sworn or affirmed before they give their testimony. Moreover, in the civil procedure code of the empire of Ethiopia of 1965 art 203 as provides facts to be proved by affidavit, and that the affidavit of any witnesses be read at the hearing, on such conditions as it thinks reasonable and the production of a witness for cross examination.

On the other word, an oath or affirmation before the witnesses give their testimony is mandatory.

In addition to this, according to proclamation No. 414/2004, the criminal code of the federal democratic republic of Ethiopia, Art 453/2/ stated

that, where a witness has been sworn or affirmed to speak the truth. Particularly where the result sought has been in whole or in part whoever being a witness in judicial or in quasi judicial proceedings knowingly makes or gives a false statement or experts. The punishment shall be rigorous imprisonment not exceeding ten years. This means, the oath or affirmation has two important points. The first one is sworn or affirmation binds the witnesses to give their testimony truly, as they know. The second function of the oath or affirmation, is the false testimonial to be punishable by his wrong testimony.

When we come to the civil servants law, the disciplinary procedure does not require the witnesses or experts to be sworn or to affirm before they give their testimony.

The researcher has observed the practices of the disciplinary committee with regard to examination of witnesses. The witnesses of a disciplinary measure are concluded without oath or affirmation before they give their testimony. The witnesses give their testimony without a moral duty, which means their testimony like an opinion or suggestion. It is that the opinion or suggestion may be true or false, because the witnesses are not bound by moral duty or does not entail a legal duty.

Therefore, we can conclude that the examination of witnesses in the government office, has its own legal and practical problems in light of ensuring justice.

3.4. The Problem of the non-legal Professionals of the disciplinary committee members

As I have discussed earlier the civil servants laws are not requiring to the disciplinary committee member's to be a lawyer's and the civil servant laws are not requiring the disciplinary committee members to get a training.

But on the other side of view, the role of the disciplinary committee is not an easy task, because their power and scopes shall have subject and limits by the civil servant's law and procedures. Which means to ensure justice in the civil service expecting from their, to understand the aim, the purpose and the goal of the law, to interpreter the civil servants law efficiently, to know the principles of impartiality, fair hearing, due process of law, to take or render fair, prompt, legal and persuasive decision. On the other word, they have a duty to apply the rules and polices effectively and efficiently, to maintain smooth operation and to protect the agencies interest and the right of individual civil servants.

To come to the researcher point of view, according to proclamation No. 515/2006 Art. 66 the objective of disciplinary penalty shall be to rehabilitate a delinquent civil servant when he can learn from his mistakes and become a reliable civil servant or to discharge him when he becomes recalcitrant and as provides Art. 67 of this proclamation and regulation No. 77/2002 Art. 19 cumulative reading, after the conclusion of the inquiry, the disciplinary committee shall forthwith submit to the head of the government office a report on the findings of the inquiry and the recommendation of the imposing penalty depending on the gravity of the offences.

But, the disciplinary committee is exercising in the civil case out of his power's, or the disciplinary committee is interfering in the jurisdiction of the ordinary court. Thus a researcher have attached four copy related to this case.

CHAPTER FOUR

Conclusion and Recommendation

4.1. Conclusion

The study of the research based on the administrative law, particularly a disciplinary measures under the civil servants law, and more emphasizes on the gaps of the law and its impact. Where as one of the prime duties of the civil servants are to develop and maintain good work habit, behaviors and relationship in a work unit for the accomplishment of the agencies.

In order to discharge this function, the civil servant itself first should be able to perform duties properly and should adhere to the provisions of the policies, the proclamation, the regulations and directives issued by the civil service authorities on the ethical conduct of the civil servants. If any civil servants failed to meet the standards, objective rules of civil service or professional ethics, he is subject to disciplinary measures.

Where a disciplinary measures are taken, they have to be made in accordance with the concerned laws, procedures and accepted principles. In addition to this when the disciplinary committee exercises its decision making powers, it is expected to observe constitutionally enforced rights and procedures. The importance of following disciplinary policies and procedures that are fair, prompt, and legal, cannot be emphasized too strongly. These are determined not only by common sense and your own departmental rules, but also by applicable rules the federal civil servants proclamation and regulations which require that all forms of discipline must comply with due process.

The main point of the research is to give solutions for problems identified problems. The writer of this thesis has identified some problems and has recommended the respective solutions as follows:

1. With regard to the composition, more of the disciplinary committee members are assigned by the head of the government agencies, then we can conclude that, there is no fairrepresentation of a disciplinary committee members in the government office in light of 'equal representative' of constitutional right. Thus, the writer of this thesis recommended that the formulation of the committee must be amended in such away that it must create equality of the representatives of both parties.
2. With regard to a quorum, the law lacks fair presentation from the assigned and elected members. And the law a gap of the term office of the reelected and reassigned members of the disciplinary committee have not a limit of the term of office.

Thus, the writer recommends that, a quorum of a disciplinary committee to be equal members from both parities and the reelected andreassigned members of a committee must have a limit of the term of office.

3. With regard to the approval of a simpledisciplinary sanction, the recommendationof the disciplinary committee and the grievance committee are approved one case in two times by thehead of the government office. Thus the writer recommends that the provisions of Art 19/1/ of the regulation to be changed by the term. After the conclusion of the inquiry, the disciplinary committee shall forth withsubmitto the concerned government office a report on the findings of the inquiry and its

recommendation and the decision made by the disciplinary committee at any level must be applicable to the administrative tribunal.

4. With regard to accountability and responsibility of the disciplinary committee members, they are not responsible, if they violate the right of the accused in the decision making process, if they may intentionally or negligently wrong recommendation. Therefore the writer recommend that, according to proclamation No. 515/2006 Article 90 as provided other committee's liability also a disciplinary committee should be liable for their wrongful act under criminal and civil law and also it is necessary to include the disciplinary committees ethical rules of conduct.
5. With regard to the non-legal professional of the disciplinary committee members, the law does not require the disciplinary committee members to be a lawyer. Unless otherwise, some or more of the disciplinary committee be a lawyer they can not render a legal reasoning, interpretation of the rule and persuasive report and they can not take the principles of fair hearing and due process of law. Thus the writer recommends that one or more of a disciplinary committee members to be a lawyer and to have a mandatory requirement of the law and additionally it is a better to give short term training to the committee members concerning to disciplinary measures, in order to achieve a fair decision and to have a good disciplinary system.
6. The witness of a disciplinary measure is not always expected to be true testimony. Their testimony is seen always as a suggestion. Because they give testimonies with out entering an oath. An oath has two consequences the first one is a moral duty and the second is legal punishment. The testimony given with out oath has not a moral duty nor a legal punishment. Thus I recommend that the witnesses should enter an oath before they give their testimonies.

7. Regarding the enforcement according to proclamation No.

515/2006 Art 14/1//a/, as provided any person who has been convicted by a court of competent jurisdiction, of breach of trust, theft, or fraud. Sub /b/ of this article, a civil servant who has been dismissed on grounds of a disciplinary offence before the laps of five years from the date of dismissal shall not be eligible to be civil servant. However, the law excluded the enforcement mechanism, in other words the agency is with out teeth, then there must be a mechanism created for enforcing its decision. Therefore, the writer would like to suggest that the concerned should be given a mandate to see to it that they can enforce their decisions.

BIBLIOGRAPHY

Books

- Abera Jenbere Unpublished **Administrative Law**.
- Aw Bradley and K.D Ewing **Constitutional and Administrative Law**. 12th edition.
- Blacks. H. Combill, **Blacks Law Dictionary** one Edition.
- Breyer Stewar **Administrative Law** 1995 edition.
- Berrard Sch Wartz **Administrative Law** 5th Edition.
- Dele Olowee First Edition 1993.
- Derck Robinson Civil Service Pay in Africa, International Labour Office, Geneva
Published 1999.
- Disciplinary Codes** and Procedure in the Public Service, 1975 International Labour
Office Jenva.
- E.C.S. Wade and A.W Bradley **Constitution and** 10th edition.
- Ethics and Accountability** in Africa Public Service Edited by Sading Rashed and
Jance Nairence Employment Law for Business Student First Published 1999.
- H.W.R. Wade and S.F Forsyth 9th Edition **Administrative Law**.
- H.W.R. Wade ACLLDFNA **Administrative Law** 5th Edition.
- IP Massey **Administrative Law** 4th Edition.
- Keneth Curp Davice **Administrative Law**, 1995 edition.
- Nail Hawke and Nail Paworth, **Introduction to Administrative Law** No. 1996
- O. Hood Philips and Pauljakson, **Constitutional and Administrative Law** 7th
edition.
- Peter Cane, **An Introduction to Administrative Law** 5th Edition.

Handout

- Administrative Law Module One**, St. Mary's University College October 2004.
- Administrative Manual** St. Mary's University College April 2007.

Law

- The **Federal Civil Servant** Proclamation No. 515/2006.
- The Federal Civil Servant **Grievance and Disciplinary Procedure** No. 77/2002.
- The FDRE Constitution** 1995.

I here by declare that this paper is my original work and I take full responsibility for any failure to observe the conventional rules of citation.

Name

Signed

St.MARY'S UNIVERSITY COLLEGE
LL.B THESIS

**CRITICAL ASSESSMENT OF SEPARATION OF POWERS
UNDER THE FDRE CONSTITUTION**

BY DEMISEW MEKURIA

ADDIS ABABA, ETHIOPIA

JULY,2008

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ADVISOR MARU BAZEZEW

In partial fulfillment of the requirements for the
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Table of Content

| <u>Contents</u> | <u>page</u> |
|--|-------------|
| Acknowledgement..... | I |
| INTRODUCTION..... | II |
| Chapter - One | |
| Definition, Doctrine and Purpose of separation of powers | |
| 1.1. Definition of Separation of Powers..... | 1 |
| 1.2. Doctrine of separation of Powers..... | 2-7 |
| 1.3. Purpose of separation of Powers..... | 7-10 |
| Chapter-two | |
| Application of doctrine of separation..... | 11 |
| of powers /countries' experience/ | |
| 2.1. Separations of powers under the United States' Constitution..... | 12-16 |
| A. Legislative power | |
| B. Executive power | |
| C. Judicial power | |
| 2.2. separations of power in United Kingdom..... | 16-21 |
| A. An Overview | |
| B. Power Sharing | |
| C. Rule of law | |
| 2.3 Separation of Powers under the Constitution of South Africa..... | 21-27 |
| Chapter three | |
| 3.1 Critical Assessment of Separation of Powers under the FDRE Constitution..... | 28-32 |
| A. An overview | |
| B. Structure of the Ethiopian Government | |
| C. Power Sharing Process | |
| 1. Powers of the Federal Government | |
| 2. Powers of States | |
| 3.2 Separation of powers between the Federal Government Organs..... | 32-44 |
| A. The legislature's power | |
| i. House of Peoples' Representatives | |
| ii. House of Federation | |
| B. The power of executive | |
| C. The Judicial power | |
| - Judicial independence | |
| - Judicial review | |
| D. Inter government organs relations | |
| i. Legislative versus executive | |
| ii. Legislative versus judiciary | |
| iii. Executive versus judiciary | |
| Conclusion & Recommendations..... | 45-47 |

INTRODUCTION

The adoption of a Federal form of government is a very recent phenomenon having the age of about a decade and half. It is at this period that Ethiopia relieved her self from a form of government where power is concentrated in the hands of a single person, and/or persons around him.

After a continuous struggle the new Federal constitution came into being in 1995. As per this constitution Ethiopia established a Federal form of government having a central government at Addis Ababa and other nine entities; so called states or regions, having their own state constitution as provided by the Federal one.

This constitutional government had brought the power sharing /distribution/ method and recognized the three arms of government the legislative, the executive, and the judiciary.

In this thesis paper, the writer tried to address different issues with regard to the doctrine of separation of powers and checks and balances that play a pivotal role in limiting the power of each government arm towards the other two.

The first chapter of the paper is devoted in discussing the definition, purpose & functions, and different theories on the doctrine of separation of powers. The application and acceptance of the doctrine in some countries, especially, the experience of USA, UK, and South Africa is covered under the second chapter.

Under the third chapter, which is the back bone of the paper, the application of the doctrine is analyzed by taking the 1995 Federal constitution of Ethiopia. In this title, the power sharing system between the Federal government and states; and between the executive, legislative and judiciary organs of the Federal government is the main focal point.

Lastly, the writer has tried to propose some remedies by way of conclusion and recommendations for the speculated problems.

Chapter 1

Definition, Doctrine and purpose of separation

Of powers

1. Definition of separation of powers

In 1690 John lock defines separation of powers in his work” on civil government”, wrote that a government can only function effectively and justly if the three functions (powers) of government are independent of each other.¹

This to mean that:-

1. the legislature:- the power to make the laws
2. The executive - the power to execute the laws. (i.e. to insure that the laws are applied)
3. The judiciary - the power to interpret or apply laws whether a person accused of breaking the law is innocent or guilty.

Another definition of separation of powers also given by Baron de Montesquieu as “A tool in government which states that the government should divide itself according to its powers, creating a Judicial, legislative, and executive branches. this system would also check and balance itself, which would help protect the peoples liberty.”²

Doctrine of separation of powers:-

The doctrine of separation of powers envisage that the legislative, executive and Judicial functions in a state ought to be kept separate and distinct from each others. there ought to be separate organs for each,

working together, but none of them should depend on and discharge the function belonging to the other

Western institutional theorists have much concerned themselves with the problem of ensuring that the exercise of governmental power, which is essential to promote the realization and the role of government in society, linked with the determination to bring that government under control and to place limits on the exercise of its power.

as some scholars claim that separation of powers requires qualification as well as justification, some say the doctrine of the separation of powers is by no means a simple and immediately recognizable, ambiguous set of concepts. On the other hand others say it represents an area of political thought in which there has been a confusion in the definition and use of terms.

Much of the specific content of the writings of earlier centuries is quite inappropriate to the problems of the mid twentieth centuries. This doctrine standing alone as a theory of government. Due to this failed to provide an adequate basis for an effective, stable political system. Therefore combined with other political ideas, the theory of mixed government, the idea of balances that provided the basis of modern western political system. Nevertheless, when all the necessary qualifications have been made, the essential ideas behind the doctrine remain as vital ingredients of western political thought and practice to day.

The doctrine of the separation of powers is clearly committed to a view of political liberty to which restraint of governmental power and this can best be achieved by setting up divisions within the government to prevent the concentration of power in the hands of a single group of man this can lead as to the view that restraints upon government are an essential part of a theory of political liberty. .

From the above we can conclude that

.. the doctrine is the assertion of a division of the agencies of government in to three categories the legislative, the executive, and the Judiciary.

2. The thought is the assertion that this three specific “Functions” of government unlike the first which recommends that each of this functions should be entrusted solely to appropriate, or “proper” branch of the government.

3. The three branches of government shall be composed of quite separate and distinct groups of peoples, with no overlapping membership

The final and the fourth element in the doctrine is the idea that if the government will act as check to the exercise of arbitrary. Power by the others, and that each branch, because it is restricted to the exercise of its own function will be unable to exercise undue control or influence over the others thus there will be a check to the exercise of government over “people” because attempts by one branch to exercise an undue degree of power will be

bound to fail. This is of course, the whole aim and purpose of the doctrine

The doctrine of separation of powers developed over many centuries, the practice of this doctrine can be traced to the British parliament gradual ascertainment of power and resistance to royal decrees during the 14th century. English scholar James Harrington was one of the first modern philosophers to analyze the doctrine. English political theorist John Locke gave the concept of separation of powers more refined treatment. He argued that legislative and executive powers were conceptually different, but that it was not always necessary to separate them in government institution.⁷

Now a day the concept of the separation of powers as a way to reduce or eliminate the arbitrary power of unchecked rules. Separation of powers thus became associated with the concept of checks and balances. The notion that government power should be controlled by overlapping authority within the government and by giving citizens the rights to criticize state action and remove officials from office.

When we see article 16 of the (French) declaration of the Rights of man (1789) states that “a society” where rights are not secured or the segmentation of power established has no constitution,” it is widely believed that in all societies there is a natural tendency for power to gravitate towards a single personal leader under whatever title. due to this the doctrine of

separation of powers attempts to combat by providing mechanisms to make it difficult for any single power group to dominate and ensure that government action requires the cooperation of different groups, each of which helps to keep the others within bounds, the doctrine is therefore, closely associated with rule of law.

As we see from the segmentation of powers aspect “the legislative department shall never exercise executive and Judicial powers or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the Judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men” Therefore the proper constitutional relationship between the executive and the court must be that the courts will respect all acts of the executive within its lawful province and that the executive will also respect all decisions given by the court as to what its lawful province is. ..

As we have seen above Judicial independence is an aspect of the rule of law in its own right. It overlaps with but goes beyond the separation of powers. Separation of powers concerns the independent of the judicial system from other branches of government. Judicial independence requires the independent of individual judges from any pressure that threaten not only actual impartiality but also the appearance of impartiality. The main central

idea to the rule of law in a modern democratic society is the principle that the Judiciary must be, and must be seen to be independent of the executive...

Judicial independence and separation of powers overlap in particular in relation to the appointment and dismissal of Judges, since judges must be immune from interference by the executive. Beyond the separation of powers, judicial independence requires that judges should be protected against attacks on their conduct in court. Thus judicial independence requires Judges to be protected against external pressures but does not mean that they should not be accountable for their actions.

The well-known writer who made to explain the principle separation of powers is M.J.C. Vile. Vile makes analysis of the main elements of separation of powers these are:-

1. The government should be divided into three categories: the legislative, the executive and the Judiciary
2. The three specific powers should be separated. It is claimed that all government acts can be classified as legislative, executive and judicial: and
3. The three branches of government shall be composed of quite separate and distinct groups of people, with no overlapping membership.

The fear of the above mentioned celebrities that if the power to make laws and enforce them is vested in one person or organ that may lead to

tyrannical. but in the case of modern democratic government this fear is not proper because there is a mechanism of check and balances and again this leads to each branches restricted to the exercise of its own functions will be unable to exercise undue control or influence over the others. 13

generally, “the doctrine of separation of powers means that government power should be divided up into legislative, executive and judicial functions, each with its own distinctive personnel and processes, and each branch of government should be checked so that no one body can dominate the others.” ..

1.3. Purpose of separation of powers:-

Separation of powers is needed in order to prevent tyranny. Tyranny is a danger. It is therefore a precaution against injustice. Due to this the powers of government must be so divided that no man or group of men may wield all of them at once.

Separation of powers is responsible for the transformation, and in addition to the negative function of preventing tyranny because this concept actively promotes good government. That is why we say separation of powers allows the government branches to perform their respective functions well or at least better than they otherwise could. Not only this the separation of powers does help to check the abuse of powers and also to

balance the constitution and helps the constitution inviolate by elevating it. ⁵

as we have seen from the above expression separation of power is done by providing a clear view of who does what, who is responsible for what, and who is to blame should be clearly defined. Because this is important when it comes to engaging the people interest and participation in politics. Again this also gives strengthening a parliament system to work effectively, institutional arrangements such as fair electoral laws, freedom of the press independent courts, due process, and the independence of the houses of parliament must be designed as to prevent executive supremacy over the legislative. And Judicial branches while also encouraging a culture of public debate, open government, accountable office holders, and policy contestability and compromise rather than a culture of “winner takes as” political domination ..

In order to promote accountability of government, hinder corruption and protect the fundamental freedoms of citizens from the will of the government of the day, it is essential to keep separate the parliament's power to make laws, from the executive's power to administer laws, and from the Judiciary's power to hear and determine disputes according to the law. This separation is designed to protect the people from a concentration of powers, and the ability of individuals or groups to manipulate government for personal gain to ignore the will of the people. ⁷

In general aspect regarding to purpose of powers we can say that a government of separated powers is less likely to be tyrannical and more likely to follow the rule of law: this is to mean that government action must be constrained by laws and the system is more democratic by making it more difficult for a single ruler. Such as president or prime Minister to become dictatorial. This division of powers prevents one branch of government from dominating the others.

Thus where there is a union of accumulation of any two powers in the same hands the liberty and well-being of the peoples is endangered, if there is a union of the legislative and executive powers there can be no liberty. Not only this if the Judicial and executive powers are combined, the Judge might behave with all the violence of an oppressor. So that in the absence of an adequate separation of powers, the governors are, free to pass whatever laws they want. They can legislate to promote their own interest over those of the citizens. ..

Generally the purpose of maintaining strict separation of powers is to promote the liberty, security of individuals and to save the people from tyrannical government. Thus, we can conclude that why we have separation of powers in democratic constitution, put the elements as follows. Balancing executive and legislative power:- from this concept two justification can arise from the separation of powers these are liberty and good government.

1. Preserving liberty. from this separation is needed in order to prevent tyranny, as we have discussed above “tyranny is a danger because man’s passions and reason are not perfectly harmonious” ..
3. Promoting good government, separation of powers is responsible for transformation to real democratic government. That is to say it allows the branches of the government to do their work properly.
4. The constitution as supreme law of the land. Although barriers are unreliable, the constitution can be relied on because the people are... and in a different way, their representatives. passions and interests will be tied to their opinion of the constitution’s important for good government. As such, the constitution underlies both the positive and negative functions of the separation of powers. With out the idea of what the branches duties are, it is impossible to know when and how to defend their rights and their independence

To sum up, propose of separation of powers is used to promote the liberty, security of individuals and to save them from dictatorial government. This is to mean that the legislative and executive powers must not be held in one hand. If this is happened then the result becoming to arbitrary control. therefore there should be a clear separation of powers in their constitutions. Till now I have tried to show the definition of separation of powers, the doctrine and the concept of separation of powers and finally the purpose of separation of powers. So, here after I will try to see how separation of powers applied in USA, UK and in South Africa in the second chapter.

CHAPTER-TWO
Application of Doctrine of Separation of powers
/Countries experience/

Under the previous chapter the writer of this thesis was interested in dealing with the origin, and the very concept of the doctrine of separation of powers in general. The different paradigms and schools of thought are also well discussed in chapter one.

It is said that “separation of powers” is a model for the governance of democratic states. Adherents of separation of powers believe that it protects democracy and forestalls tyranny; where as, some others, as opposed to this argue that separation of power slows down the process of governing, promotes executive dictatorship and unaccountability, and tends to marginalize the legislature.

Although there are disparities in the degree of acceptance, many countries are adherents of Montesquie’s Tripartite system so that the powers of their government is shared b/n the three arms of government; i.e.

- 1: The legislative - the law maker
- 2: The executive - the enforcer or executor
- 3: The judiciary- which is the interpreter of the law

Under this chapter this writer is interested in addressing the experience of some countries on the issue at hand.

2.1 Separation of powers under the United States constitution

The United States of America was the first nation that used a written constitution to formally adopt the concept of separation of powers as the frame work for its government.

The 17th century enlightenment has taken the lion's share for today's features of American government because different writers dictate that the writings of enlightenment thinkers were well- known to the framers of the United States constitution. They further state that United States was a "blank state" political country when the first constitution was framed. They also remember that unlike the European nations, the new United States had no centuries-old monarchy or aristocracy to make claims on government power-

The three organs of US government are defined under the first three articles of the constitution. The power sharing mechanism is also displayed under these articles.

A- Legislative Power

Article 1 of the United States' constitution vests the legislative power on the congress.

The US congress is composed of two houses:

1. The house of representatives and
2. The senate

The representatives are those personalities who work for the interests of the local districts they represent, where as, the senators represent the interests of the entire united states.

Making a law requires the agreement of the two houses.

According to art. 1 of the constitution, the congress has the power:

- Over the government's budget,
- To raise tax
- Borrow money and spend money,
- To declare war and to raise and support military forces, to regulate commerce b/n the states and united states and other countries e.t.c.

B. Executive Power

The powers of the executive branch of the US government are defined under Art 2 of the constitution. The executive organ is headed by the president. It is empowered to implement the laws passed by the congress. The president is the commander-in-chief of the army as well. The president also has the power subject to the advice and consent of the senate, to make treaties, nominate judges to the federal judiciary. And appoint officers of the government ,

Giving pardon is also his power. So long as the executive power is vested in the president he/she is responsible to take care that the laws enacted by the legislature be faithfully executed; i.e. by controlling the subordinate officers in discharging their duties.

C. Judicial Power

As per art.3 of the US constitution the judicial power is vested in the Supreme Court and the federal judiciary.

The judiciary is empowered to hear all cases and controversies arising under the constitution, federal law, and treaties with other nations. Some other specialized cases like controversies b/n two or more states are also to

be entertained by federal judiciary. the judges are appointed by the president with advice and consent of the senate.

In the US system, courts exercising the judicial power are called “constitutional courts” in addition to these courts the congress may create the so called “legislative courts” which frequently take the form of quasi-judicial agencies or commissions whose members do not have the same security of tenure or compensation entitled to the judges of the constitutional courts. As to some writers what differentiates the legislative courts from the constitutional courts is that the former do not exercise the judicial power of the United states rather they are empowered to entertain cases of “public rights” questions (i.e. cases b/n the government and an individual involving political determination).

As it is pointed above when we say constitutional courts, it does refer to the courts established by the constitution it self in order to entertain different cases. Where as the legislative courts are those courts that are established by legislative acts of the congress when it deems necessary. But on the real ground, there is no “constitutional court” proper; rather it is the supreme court that is empowered to interpret the constitution.

As it is discussed above, the power sharing process among the three government limbs entailed the very notion of separation of powers is not absolute because it is qualified by the doctrine of checks and balances. It is a safety valve to check one another. It enables “people in the government to impede in the work of others in the government if they believe the work to be a violation of rights for example, if one organ is found irresponsible, the other two can remove members of the first from office. Which is known as impeachment ⁹.

Impeachment in the United States is an expressed power of the legislature which allows for formal charges to be brought against a civil officer of government for conduct committed in office. The actual trial on those charges and subsequent removal of an official on conviction on those charges is separate from the act of impeachment itself: impeachment is analogous to indictment in regular court proceedings, trial by the other house is analogous to the trial before judge and jury in regular courts. Typically, the lower house of the legislature will impeach the official and the upper house will conduct the trial.

At the federal level, Article two of the United States constitution (section 4) states that “the president, vice president, and all other civil officers of the United States shall be removed from office on Impeachment for, and conviction of, Treason, Bribery, or other High Crimes and Misdemeanors.” The House of Representatives has the sole power of impeaching, while the United States Senate has the sole power to try all impeachments. The removal of impeached officials is automatic upon conviction in the senate.

Impeachment can also occur at the state level; state legislatures can impeach state officials, including governors, according to their respective state constitutions.

(http://en.wikipedia.org/wiki/Impeachment_in_the_United_States)

Checks and balances could also be made by letting two organs of government work together to enact certain decisions. For example, treaties require the agreement of both the president and the senate.

When we see the executive, the president enjoys a check over the congress through his power to veto bills; his pardon is not subject to approval by either house of the congress, appointment of judges though it requires the approval of the senate etc.

The judiciary also entertains checks over the other two. For example, the judiciary can declare executive acts and laws passed by the legislature unconstitutional.. Provided the act and the law are respectively are contrary to the constitution. Generally, the doctrine of separation of powers, qualified by the principle of checks and balances, as it is discussed earlier under the U.S context, could be exemplified as a well developed system in applying the concept of separation of powers.

2.2 The Doctrine of Separation of Powers in United Kingdom

A. An overview

Different writers on the doctrine of separation of powers such as, J.C. Johari, declare Britain to be the ancestral home of the parliamentary government and its parliament is happily described as the ‘mother’ of the modern parliaments; and her constitution, though unwritten, is appropriately landed as a testament of democracy in a land without a “declaration of independence .. He further emphasized that the fact that Britain does not have a coherent, well-formulated and written constitution does not substantiate the charge that “there is no constitution in England.” “The true position is that the English constitution is a growth, not a make. It is never made in a way as the constitution of other legal systems was made.” It means that this constitution was never created by a stroke at any particular period of history. No constitution-making body ever met to formulate the fundamental law of the English people. ¹⁰

The writer mentioned above also magnified the English constitution as “an ever-green tree bearing fruits and flowers in response to the climatic conditions, or it has been described as a living organism ever-growing and functioning without having sudden leaps or suffering from unexpected

breaks.” James Bryce also calls this constitution “a mass of precedents carried in men’s minds or recorded in writing dicta of lawyers or states men, usages, understandings, a number of statute is mixed up with customs, beliefs, and all covered with a parasitic growth of legal decisions and political habits.”

As it is indicated above the British constitution is the model of an unwritten constitution. Its written part is limited to some important charters signed by the monarchs, statutes passed by the parliament and decisions given by the courts. But its larger part is unwritten as it is available in the form of several usages and customs. Many examples could be referred in this regard: such as

- The 1215 Magna Carta;
- The 1928 Petition of Right;
- Habeas corpus Act of 1979;
- The 1689 Bill of Rights;
- The 1701 Act of Settlement;
- Act of Union of 1707 etc. ^

In general the UK constitution has internal and external segments as displayed above.

B. Power Sharing

The other main point to be raised is that the British constitution is unitary. “The central government located at London is constitutionally supreme where as the rest units like those of Wales, Scotland and Northern Ireland derive their authority from the central government. It is the sovereign parliament that is empowered to enact laws for the whole country, or it may delegate some of its powers to a local parliament like that of Northern Ireland-

The British parliament is composed of

1. The sovereign;
2. House of Lords; and
3. The house of commons

These three together exercise the legislative function of the government. The executive organ, which is composed of the King or Queen, the Prime Minister and his cabinet, resides in the sovereign, but under the conventional law of the constitution it acts only upon the advice of the ministers who sit in the two houses of parliament. The house of commons is traditionally said to be the lower house of the parliament; but in reality it is powerful.

Different writers, taking into account different features of the UK constitution, quote that in United Kingdom “nothing is what it seem, or seems what it is, as discussed earlier, its unique manner is also disclosed in the power concentration among the executive and the legislature and, at the same time, as per the wordings of J.C. Johari, these have been separated, rather, diffused, in the midst of what bagehot calls “supposed checks and balances” of the constitutional system. But what should be emphasized here is that the meaning of the term ‘ separation of powers does not have the same implications here that were given by Montesquieu and what we find in the American constitutional system. Writers such as J.c. Johari.... on the area of separation of powers state that in united kingdom there is no clear demarcation between the three government arms; are not separated, but are entwined. In this legal system, there is a considerable amount of defacto independence among agents exercising various functions, and the sovereignty of the parliament is limited by various legal instruments, international treaties and constitutional conventions. 5

C. Rule of Law

Unlike other legal systems, it is the concept of rule of law that is given greater attention in UK than the doctrine. Because of their strengthened opinion on the rule of law they quote that “it is through the rule of law that the English men have sought to avoid not merely the obvious dangers of unfettered executive discretion in administration; we have sought also to assure that the citizen shall have his rights decided by a body of men whose tenure is safeguarded against the shifting currents of political opinion.” The British legal system gives much emphasis to the rule by the super-science of law than rule by super men. They further argue that the welfare of the people is the supreme law; which implies a constitutional form of government which exercises power in accordance with law denying any chance for the King or his ministers to identify themselves with the state in the fashion of King Louis XIV of France. In general terms, the concept of rule of law, as a fundamental principle of the English constitutional system, signifies that the exercise of the powers of government shall be conditioned by law and that the subjects shall not be exposed to the arbitrary will of their rulers-..

Different writers quote that in united kingdom nothing is what is seem, or seems what it is when referring to the power sharing system. UK has a parliamentary form of government where the executive is responsible to the legislature. There is difference b/n the theory and the practice. In theory, all executive, legislative and judiciary powers of the country are vested in the queen so that all the officers including the primary minister and other ministers are to be appointed by the queen. Where as, in practice, the queen has no control over administration. ¹⁷

Prominent writers further emphasize that there is a close correspondence b/n the cabinet and the parliament for the members of the cabinet are the leaders of the majority party in the House of Commons. Because of this Britain is blamed for power fusion. They further argue that in United Kingdom, the executive forms a subset of the legislature, and so does the judiciary though the extent is less. The prime minister, the chief executive, is conventionally expected to be member of the House of Commons and can effectively be removed from office by simple majority vote. The other example could be, since the executive is drawn from the leadership of the dominant party in parliament, party discipline often results in a defacto situation of executive control of the legislature, although in reality members of parliament can reject their leadership and vote against them. ¹⁸

As far as the judicial process is concerned the house of lords is the highest court of appeal for civil matters in the United Kingdom and for criminal matters for England, Wales and Northern Ireland. The highest court of appeal is part of the House of Lords which means it is part of the legislature. Because of the concept of parliamentary sovereignty the parliament has ultimate authority over all affairs of government, including the monarch and the courts which seems indirect opposition of the very concept of separation of powers..

Generally, when one compares the application of the doctrine of separation of powers among the three government arms because of the existence of parliamentary sovereignty in united kingdom, while theory of separation of powers may be studied in Britain, she is well known for her “fusion of powers”-.

2.3 Separation of Powers under the Constitution of South Africa

J.C Johari in his book titled new comparative government, dictate that the political systems of third world countries are not included in the major political system of the world. But these days this political basis seems to be changed for the reason that the attention is now laid more and more on the third world countries. Some developing countries like, Egypt, Nigeria and south Africa have a natural claim for their inclusion in the major political systems of the world.^{2 1}

South Africa, which is the other area of reference for this paper, has been included under this study where the black people waged a long struggle to abolish the rule of white people/apartheid/and become successful in taking power in their hands by peaceful and democratic means. It is after passing a series of historical movements that today’s South Africa gained its current features.

Before the current constitution the country had passed through different constitutions. For example, as a result of a referendum held in Oct. i960, and 31 may 1961, among the white voters, South Africa become a republic and left its membership of the common wealth nations. But the new constitution comes into being in September 1984 because of the continuing struggle of the black people against the white rule.²²

Under this constitution legislative power was vested in the president with a trilateral parliament. It consisted of

1. House of assembly-having 178 Members that represent the whites,
2. House of representatives of the colored people (with 85 members)
3. House of Delegates that represents Indians-having 45 members. ²³

And yet, the struggle of the colored people continued for they were not satisfied with this arrangement. As a result of this the new interim constitution was adopted. This new South African constitution was adopted on 8 may, 1996 and came into force on 4 February, 1997. An 11-member constitutional court was also installed in February 1995 to ensure that the executive, legislative and judicial organs of government adhered to the principles enshrined in the interim Constitution and to endorse a final constitutional text with respect to these principles. ²⁴

The coming into force of this constitution laid the ground for new legal order in South Africa. Where as the combination of the executive and parliament had exercised a virtual monopoly of power. This was replaced with a system when the constitution become the supreme law of the republic and any law or conduct inconsistent with it invalid, it gave way to the new constitutionalism having different core values like, equality, human dignity, the respect of human rights and freedoms, non-racism and non-sexism, a democratic system of governance, and the rule of law. ²⁵

South Africa has a presidential form of government with bicameral parliament.

When we see the separation of powers, it is employed to ensure that the new system of government contained within it the necessary “checks and balances to up hold the different values enshrined in the constitution. The constitution of South Africa protects the doctrine of separation of powers

although it does not refer to it explicitly. For example, in the famous case, “south African association of personal injury lawyers Vs heath” the constitutional court held that there ‘ can be no doubt that our constitution provides for such a separation [of power] and that laws inconsistent with what the constitution requires in that regard, are invalid.-.

The constitution acknowledged that the legislative, the executive and judiciary perform their separate functions. For example, section 165 of the constitution vests the judicial authority of the republic in the courts. And the corresponding provisions vest the legislative and executive authority in parliament and in the president as head of the national executive, respectively it is also further emphasized that the legislature can not be held responsible for the execution of the laws it enacts, nor may it decide on the cases arising out of these laws which rather requires the role of an independent and impartial judiciary.²⁷

Like other developed countries of the world, South Africa has a bi-cameral national legislature (parliament). Its lower house is the national assembly having at least 350 and at most 400 members who are elected in general by proportional representation system for a term of five years. The national council of the provinces is its upper house composed of 90 seats for the existing 9 provinces. Each provincial legislature appoints 6 permanent delegates and 4 especial delegates to this chamber. Its term is of five years. The main point here is that the national and provincial legislatures are elected separately under a double ballot electoral system” which means the elections are held simultaneously of national and provincial legislatures in that a voter casts one vote for the national assembly and the other on for the assembly of the province. Q

In general since it is a federal state, power is shared b/n the central government and the states or provinces.

As it is discussed earlier, the judicial authority of the republic is vested in the courts which consists of

- a. the constitutional court
- b. the supreme court of appeal,
- c. the high courts,
- d. the magistrates' courts and
- e. Courts established or recognized by a law of parliament. ²⁹

The judicial power is shared among these courts.

As to some writers there is interdependence among the three arms of South African government. For example, interims of section 89 of the constitution, the president is elected by the parliament and sworn in by the chief justice. He or she can be removed by parliament in cases of misconduct, inability or serious violation of the law. In turn the president him self has a responsibility in relation to both the judiciary and parliament. He or she is expected to participate in the appointment of judicial officers, albeit with the interposition of the judicial service commission, and it is the president's function to assent to bills from parliament before they become law.

The constitutional court of South Africa has a primary role in safe guarding the rule of law and the supremacy of the constitution. It performs its functions by considering different cases brought before it with regard to the other two branches of the government. It had entertained different cases related to the two organs.

For example; "As in many parliamentary systems, the most conspicuous element in south Africa is that member of the executive- the

cabinet- are also members of parliamentary system, the most conspicuous element in south Africa is that members of the executive- the cabinet-are also members of parliament. This is one of the question the court had to decide-whether a cabinet member's concurrent membership in parliament was consistent with the doctrine of separation of powers. The court held that the system of separation of powers is not a fixed or rigid constitutional doctrine. It is given expression association in many different forms or made subject to checks and balances of many kinds. No system of separation of powers is perfect or absolute. Further, the court held that the South African variant of the system in any event strengthened accountability of the executive arm of government to the legislative branch and therefore did not violate the doctrine-.

The law making process also displays the close relationship b/n the legislature and executive. Members of the cabinet prepare and initiate legislation which is then introduced either into the national assembly or the national council of provinces for debate and passing. Once a bill has been passed by parliament, it is presented to the president for signature. The president has limited powers to refuse to assent to a bill. He may refuse to sign the bill if he has reservations about its constitutionality in which case he must refer it back to the national assembly. If it is referred back to the president, he or she still entertains doubts about its constitutionality; the bill must be referred to the constitutional court though it is rare.

3 2

The functions conferred on the legislative organ to illustrate the particular South African conception of the doctrine of separation of powers. For example the constitution emphasizes that its powers are not only making laws; but to ensure government by people under the constitution / section

42/21) similarly, section 55(2) of the constitution states that:- the national assembly must provide for mechanisms to-

a- ensure that all executive organs of state in the national sphere of gov't are accountable to it; and

b- maintain oversight of

I- the exercise of national executive authority, including the implementation of legislation; and

II any organ of state³³

An important aspect of the separation of powers in South African constitution is displayed by the role of the legislature in overseeing executive action and holding the executive accountable for the performance of its obligations.

But when we come to the judicial process, the application of the doctrine is a bit tight. No person or organ of state may interfere with the functioning of the courts; rather are required to assist and protect the courts; to ensure their independence, impartiality, dignity, accessibility and effectiveness. Here, judges are appointed by the president "On the advice of the judicial service commission; and are removed by the president only if the judicial service commission has found the judge to suffer from an incapacity or to be grossly incompetent or of poor quality of good conduct and if 2/3 of the members of the National Assembly call for his or her removal...

Generally, what can be observed from the overall jurisprudence of the Republic is that the doctrine of separation of powers in the South African constitution contains a variety of principles. Although it is not absolute, this doctrine rests on a functional understanding of the powers and requires that each institution's character and competence to perform these powers be

protected. The role of their courts also extends to the extent that reviewing the functioning of the legislature and executive branches. In addition to this, South Africa follows a cooperative federal system in which the government power is shared b/n the center and states or provinces;

But all are inter-dependent and inter-related; so that they work together for the common good-

The reason to this is that the south African constitution meets all the requirements of a federal system. But its unique feature is that makes it a model of cooperative federalism. This Idea is clearly stated in the provisions of chapter 3 section 41(1) (a-h),(I-VI), and section 41(2-5) of the constitution.

To sum up, the south African model of separation of powers does not follow the classic exposition of Montesquieu. Because

1. the cabinet, including the president, remains dependent on parliament to govern and can be dismissed by a vote of no confidence
2. on election the president leaves and takes up a dual role - as head of the executive (in fact as a prime minister) and as head of state.
3. The parliament may not be dissolved for three years following election (section 50 of the constitution).
4. The constitution made it clear that executive powers were to be exercised in terms of the constitution and that the courts were the guardians of the constitution- but the line between legitimate control by courts impermissible intrusion in to realm of the executive not clearly drawn. Therefore we can say that the South African constitution has not achieved a fully articulated doctrine of the separation of powers.

CHAPTER THREE

Critical Assessment of Separation of Powers under the FDRE Constitution

A. An Overview

The adoption of a Federal system of government is a very recent phenomenon in Ethiopia. She is declared to be a Federal polity after the coming into force of the 1995 constitution. Some Ethiopian commentators dictate that the move to the adoption of constitutional federalism was only a culmination of the process of decentralization that was taking place since 1991 that was ushered in after the fall of the military regime. This new constitution that established the country as a federation of multi-ethnic nation, identified nine nations as sub entities that constitutes the Ethiopian Federation.

The very base of Ethiopian state formation has an ethno-linguistic nature; i.e. it is based on language, identity, settlement pattern, and consent of the people. In that she is said to be a country of ethnic federalism.

B. Structure of the Ethiopian Government

Under this part of the paper the writer is interested in addressing the general structure of the Ethiopian government as provided in the 1995 constitution.

The structure of the government is displayed under the fifth chapter of the constitution; titled “The structure and Division of Powers.”

when we see the FDRE constitution, under its Art 50(1) states that:

“The Federal Democratic Republic of Ethiopia comprises the Federal Government and the state members.”

This shows that Ethiopia is the composition of the Federal /central/ Government, seated in Addis Ababa and other nine states having their own

capital. Both the Federal and state governments are entitled to have their own legislative, executive and judicial powers.

The 1995 Ethiopian constitution is said to be a compact document with a significant degree of clarity and simplicity. It has 106 Articles enshrined under 6 major chapters. According to this constitution the makers of the constitution are the “nations, nationalities and peoples-

This constitution is also unique from its ancestor constitutions for it is rich of basic principles or rule of law, self-determination, power /ethnic/ sovereignty, inter-ethnic and inter-religious equality, gender equality, constitutional supremacy, respect for fundamental rights and freedoms, accountability and transparency of government, and its secularism etc. ³

Since it is the supreme law of the land, all decisions, acts and practices are required to be in compliance with the Federal constitution. This constitution proclaimed source of power legitimacy to be law; thereby ruling out the pre existing traditional sources of legitimacy in Ethiopia: like, religion and force.

C. The Power Sharing Process

In the previous chapter the writer of this thesis has tried to magnify the power sharing process of different legal systems; both vertically and horizontally.

In this sub-section I am interested in discussing how powers of Ethiopian government are distributed between:

- i. The Federal government;
- ii. The states;

i. Powers of the Federal Government

As it is envisaged under Art. 50/2 of the Federal constitution, both the Federal and state governments do have their own sphere to entertain legislative, executive and judicial powers.

The different powers of the Federal government are provided under Art. 51 of the constitution. It has the following powers:

Protecting and defending the constitution;

Formulating and implementing the country's policies, strategies and plans in respect of overall economic, social and development matters;

Establishing and implementing national standards and basic policy criteria for public health, education, science and technology as well as for the protection and preservation of culture and historical legacies;

Formulating and executing the country's financial, monetary and foreign investment policies and strategies;

Enacting laws for the utilization and conservation of land and other natural resources, historical sites And objects;

Establishing and administering national defense and public security forces and federal police force;

Formulating and implementing foreign policy; negotiating and ratifying international agreements;

Levying taxes and collecting duties on revenue sources reserved to the Federal government; drawing up and approval and administration of the budget of the Federal government;

Regulation of inter-state and foreign commerce;

Determining matters of nationality;

Patenting inventions and protect copyrights; etc. /see Art. 51/

All the aforementioned and other powers of the Federal government are to be entertained by the 3 arms:

- the legislative;
- the executive; and
- the judiciary

One thing to take note here is that the Federal government may, when it found necessary, delegate its powers to states (Art. 50/9).

ii. Powers and Functions of States

States are the other ingredients of the Democratic Republic of Ethiopia. All the nine states have their own constitutions immediately after the coming into force of the 1995 Federal constitution.

The fact that they have their own constitution is not only comply with the very principle of “self-rule” inherent in federalism, but also had a root in the Federal constitution itself which clearly provided their right to make and implement their own constitution. According to Art 52(b), they are empowered to enact and execute the state constitution and other laws.

As has been hinted earlier, the nine states have equal power and rights notwithstanding the significant economic disparity between them. These powers of the state entities are proclaimed under Art. 52 of the Federal constitution; all powers not given expressly to the Federal Government along, or concurrently to the Federal Government and the states are reserved to the states. (Art. 52(1)).

Constitution with the above sub Article, they are also given power to:

- establish a state administration that best advances self-government, a democratic order based on the rule of law; to protect and defend the federal constitution;
- formulate and execute economic, social and development political policies, strategies and plans of the state;
- administer land and other natural resources in accordance with Federal Laws; etc. (Art. 52/2) (a-g)

In addition, as it has been pointed earlier they may have additional powers based on circumstances, through delegation from the Federal government.

When entertaining all these powers, the due process of law and equal protection clauses as stated in the constitution for the protection of civil liberties is the primary responsibility of the states.

The Federal constitution under its Art. 50(8) puts an obligation on both the Federal government and states to respect each other's powers enshrined in the constitution.

When we see the state structure, each state has 3 structures:

- i. The state council;
- ii. State administration; and
- iii. State judicial power.

The state council: - is the major organ that has the power of legislation all matters having state jurisdiction it is this body that passes laws on the powers given to states. In addition it is also entitled to draft, adopt and amend the state constitution in line with the provisions of the Federal constitution.

The State Administration: - is the other branch of state government that constitutes the highest organ of executive power. Administrative agencies discharging different activities are parts of this body.

The judiciary: - state judicial power is vested in its courts. Each state has a 3 level court structure;

- the state supreme court
- the state high courts (zonal courts)
- state first instance (woreda courts)

It is between the above three state government organs that all the powers given to the states is shared and enjoyed.

Since it is timely and difficult to address the separation of powers in the constitutions of the nine states, the writer of this thesis is bound only to see how power is shared among the three government organs of the Federal state by referring the 1995 Federal constitution.

Separation of Powers between the Federal Government Organs

The Federal constitution established a parliamentary form of government as proclaimed in its Art. 45. It has two Federal houses:

- a. The House of Peoples' Representatives;
- b. The House of the Federation. (Art. 53)

In addition the Federal government has other arms of government so that the idea of separation of powers, and checks and balances will come into picture. Under this sub-title the power given to each organ, the separation between them, the method of checking each other and the interdependency among them will be discussed.

A. The Power of the Legislature

1. The House of Peoples' Representative (HPR)

The house of peoples' representatives is the supreme political organ in the country. It is the body whose members are elected for a term of five years. As such, it enjoys the decisional, control and representative powers of legislatures elsewhere in the country. Members of this House are representatives of the Ethiopian people as a whole, and governed by the constitution, the will of the people and their conscience as highlighted by the constitution. /Art. 54/. They are responsible to the people of Ethiopia. Each member of the House has a constitutional guarantee not to be prosecuted on account of any vote he casts or opinion he expresses in the House or against any administrative action except in cases of flagrante delicto. .

When we come to its power, as it is provided in Art. 55 of the constitution have the power of legislation in all matters falling under the jurisdiction of the Federal government. So it is empowered to enact laws on

- > The utilization of land and other natural resources;
- > Inter-state commerce;
- > Nationality, immigration, passport;

- > Patents and copy rights;
- > Enacting a labor code;
- > It shall enact a commercial code;
- > It determines the organization of national defense, public security, and national police force;
- > In conformity with Art. 93 of the constitution it shall declare a state of emergency; it shall consider and resolve on a decree of a state of emergency declared by the executive.
- > Ratifying international agreements concluded by the executive; etc.

B. The House of Federation

The House of the Federal government whose members are representatives of each “Nation, Nationality and people of Ethiopia. Its main task is constitutional interpretation as provided under Art. 62.

Each Nation, Nationality and people shall be represented in this House by at least one member; and shall be represented by one additional representative for each one million of its population. Members of the House are elected by the state councils which could be conducted either by the council itself or directly by the people.⁷

Although this House was meant to be a counter-majoritarian institution to balance against the majoritarianism in the HPR and to protect minorities that could be left defenseless in the fact of “blunt” democracy, it hardly could serve that role because of two reasons.

A. because it hardly involves in law making; and

B. in its composition, it replicates the situation in the HPR. Although each ethnic group has one member in the House of the Federation /HOF/, those who have extra one million will have additional one member. Consequently, the numerically dominant one, which dominates the HPR dominate the HOF as well. .

The House of Federation also plays a pivotal role in determining the allocation of revenues jointly raised by the states and the federal government by acting jointly with HPR. In addition, in its constitutional interpretation, it is assisted by an expert body known as council of constitutional inquiry /CCI/, which is empowered to examine cases up on which constitutional interpretation is requested and submits its recommendations to the HOF, which then makes a final binding decision upon cases (Art. 84). In such instances, the decision rendered by this House will be considered as law and applied to similar cases that arise in the future. (Two proclamations issued in 2000, clarify these procedures for disposition of cases of constitutional dispute and establish the binding nature of the decisions of the House on similar future cases thereby introducing the precedent system in country of mainly civilian legal tradition. (see Proc. No. 25 0/2001 and 251/2001 for further details,.

C. The Powers of the Executive Branch

This is the second arm of the Federal government where the ultimate authority is vested. It comprises the Prime Minister and office of the council of ministers.

Art. 73 of the 1995 Federal constitution highlights that “Power of the government shall be assumed by the political party or a coalition of political parties that constitutes a majority in the HPR.”

1. The Prime Minister

From the wordings of Art. 73(1) and (2), it is plausible to conclude that appointment of the Prime Minister is choosing of a man or woman from the party having majority in the parliament in that he/she is elected from among members of the House of peoples’ representatives. When we come to the powers, the Prime Minister is the chief executive, the chair man of the council of Ministers, and the commander-in-chief of the national armed forces.

He is also empowered to submit for approval to HPRs nominees for ministerial posts from among members of the two houses or from among persons who are not members of either house and possess the required qualifications.

He/she also leads the council of Ministers, coordinates its activities and acts as its representative as well, etc. /See Art. 74/. These and other powers stated in the constitution clearly displays that the prime Minister is the one who takes the Lions-share in the decisions of both political and economic matters.

2. The Council of Ministers

This body is the other ingredient of the executive organ of the Federal government. It entails

1. The Prime Minister;
2. The Deputy Prime Minister;
3. The Ministers; and
4. Other members as may be determined by law. (Art. 76(1)).

As per Art. 75(2) this council is responsible to the Prime Minister. Its decisions are responsible to the HPR as well.

- > Ensuring the implementation of laws and decisions adopted by HPR;
- > Drawing up the annual Federal budget, and when approved by the HPR, implementing;
- > Protection of patent and copy rights;
- > Ensuring the observance of law and order,
- > Declaring state of emergency etc are some of the major powers given to the council of ministers.

D. The Judicial power of the Federal Government

The 1995 Federal constitution also recognized the establishment of an independent judiciary with the Federal Supreme Court at the top of a three level hierarchy.

Some writers dictate that “the basic principle behind the general recognition and respect for the doctrine of separation of powers, despite the many attacks upon its connections with the rule of law. Respect for the law is the most essential element in any government. The organ of government which plays a crucial role in implementing confidence and respect in the law is the judiciary

Under this section, this writer is interested in addressing the structure and powers of the federal courts, their independence, and the judicial review process.

1. Structure of the Courts

The Federal government has a 3-tier hierarchy court structure:

- > The Federal Supreme court;
- > The Federal High Court; and
- > The Federal First Instance Court.

The HPR, by 2/3 majority vote, may establish nation wide, or in some parts of the country, the Federal High court and First Instance courts if it deems necessary. Until then the jurisdictions of these two courts is delegated to the state courts in some areas.

2. Judicial Independence

Since the judicial powers, both at Federal and state levels are vested in the courts, they need to be independent from any interference.

In ensuring the independence of the courts, the constitution clearly testifies that courts of any level shall be free from any interference or influence of any governmental body, official, or any other source. It further

emphasizes judges shall exercise their functions in full independence and shall be directed solely by the law, and no judge is removed from his duties before he reaches the retirement age determined by law except by the decision of the judicial administration council during violation of disciplinary rules or gross incompetence or inefficiency; or the judge is not capable of discharging his duties because of illness; and when HPR or the concerned states council approves by a majority vote the decisions of the judicial administration council. In order to safeguard the independence, the constitution also prohibits the establishment of special or ad-hoc courts that take judicial powers away from the regular. Courts or institutions legally empowered to exercise judicial functions and which do not follow legally prescribed procedures. (Arts. 78 and 79).

The Federal Supreme Court shall have the highest and final judicial power over Federal matters. The concurrent jurisdiction of the courts is clearly stated under Art. 80 of the constitution. It is based on this demarcation that all the courts are required to function.

Having all these power sharing methods and different spheres of functioning between the three arms of the Federal government one may conclude that there is a clear separation of powers among them. But, is it really the case? Can't we find the involvement of one organ in the function of the other? What about the method of checks and balances between them? All these and other points will be addressed in the following sub-sections.

E. Inter-Government Organs Relations

Under this part the relation between the legislative, executive, and the judiciary organs of the government, method of checks and balances, in relation with the doctrine of separation of powers will be discussed by referring to their powers stated in the constitution.

I. Legislative Vs Executive

Though some Ethiopian writers highlight that the parliamentary control over members of the executive are members of the legislative as well the executive emanates from the basic principle that parliament embodies the will of the people and therefore be able to supervise the way in which public policy is carried. The relation between these two organs could be traced from different constitutional provisions. For example, under Art. 55 it is stated that the HPR, which is the law-maker is empowered to ratify international agreements that are concluded by the executive. Appointment of members of the council of Ministers requires the blessing from HPR. Their membership needs the approval of the parliament. Above all, the parliament has the power to call and to question the Prime Minister and other Federal officials and to investigate the Executive's conduct and discharge of its responsibilities. It further adds that at the request of 1/3 of its members; discuss any matter pertaining to the powers of the executive. (Art. 55).

The executive's interference could also be seen from art. 60(1) of the constitution. This provision proclaims that with the consent of the HPR, the prime Minister may cause the dissolution of the House before the expiry of its term in order to hold new elections. According to this article, although the consent of the house is a pre-requisite, its dissolution could be made by the prime Minister, the chief executive. This is one mechanism where the chief executive checks the legislature but the reverse is not true.

The council of ministers is also empowered to submit draft laws to the HPR on any matter falling under this competence; such as, draft laws on declaration of war. It shall also enact regulations by its power vested in it by HPR. In one way or another all the aforementioned examples disclose the interference of one organ into the functioning of the other.

In addition to this, the parliament has a say in determining the budget of the executive even though it is drawn by the executive itself. Both the Prime Minister and the council of Ministers are also required to be responsible to the HPR. The Prime Minister is also elected from among members of the HPR; that means a single person is a member to both the legislative and executive organ. He is also required to submit nominees for ministerial posts from among members of the two houses or outside, to the HPR for approval; it is the house that gives the blessing for the membership; and a minister may be a member to both the legislature and executive.

At this point one may ask that why should the prime Minister is empowered to submit nominees for ministerial posts those persons who are not members of either House. Since all sovereign power resides in the nations, Nationalities and peoples of Ethiopia, why should power is given to those persons not elected by the people? As to the opinion of this writer, empowering these persons do not comply with the constitution's provision that magnify all sovereign power is vested in the peoples of Ethiopia; because the people are entitled to exercise their power through their representatives who passed the normal election process. Although they are to implement laws passed by the parliament they have to pass through the will of the people

It is the executive which is a watch-dog for the implementation of the laws, policies, directives, and other decisions adopted by the legislative organ. The other method of checks and balances could be traced from the obligation of the Prime Minister to submit to the HPR periodic reports on work accomplished by the executive as well as on its plans and proposals. (Arts. 72-77)

From the aforementioned examples one can clearly see the inter-relation and method of checking or control of one organ over the other; so

that it is plausible to say that there is no clear separation of powers among the legislative and the executive organs of the Federal Government.

II-The Legislative Vs Judiciary

The other area of reference to discuss the application of separation of powers and checks and balances is the relation between the legislative (parliament) and the judiciary.

Although the courts are free to decide over all justiciable matters including those in which constitutional rights of citizens, they have an equivocal position with regard to the power to interpret the constitution though the ultimate power of interpretation is explicitly given to the House of Federation (HOF). Because of this different scholars argue that the practice shows the absence of judicial review of legislative acts for constitutionality in Ethiopia..

As far as the concept of judicial review is concerned, although there is a room for the separation of powers, especially by highlighting the independence of the judiciary, the constitution also declares the establishment of the council of constitutional inquiry. The judicial power vested in the courts is snatched by this council for the constitution empowers it to give decisions on all constitutional disputes. But this organ is not a judicial organ and has no authority to interpret the constitution; but rather have powers to investigate constitutional disputes. And after considering the case and found it needs the constitutional interpretation, it submits its recommendations to the HOF so that the house gives final and binding decisions on the matter (Art. 84). As per this provision when issues of constitutional interpretation arise in the courts, the council is empowered to remand the case to the concerned court if it finds there is no need for constitutional interpretation; and the interested party, if dissatisfied with the decision of the council, may appeal to the HOF.

Even when we take a look at the composition of the council, it has 11 members: These are:

1. The president of the Federal Supreme court;
2. The vice-president of the Federal Supreme court;
3. Six legal experts, appointed by the president of the Republic on recommendation by HPR, who shall have proven professional competence and high moral standing;
4. Three persons designated by HOF from among its members. (Art. 82)

It is these personalities that form the council of constitutional inquiry.

However, the issue whether or not the House of the Federation is the 'sole' interpreter of the constitution in all constitutional matters is still a bone of contention. Because it is believed that since courts are there to interpret laws, in their day to day activities they are applying the different laws passed by the parliament which are enacted inline with the constitution, that is different rights and freedoms of people and in a way they are interpreting the constitution. But as per Art. 83 of the constitution the house is empowered to decide on constitutional disputes. Some writers argue that courts are allowed to interpret the constitution to declare null and void laws other than those made by the state and Federal legislative bodies; that means courts can test the unconstitutionality of regulations and directives as well as the decisions of both state and Federal executive organs. ¹²

In order to solve the disparity and controversies on the issue of constitutional interpretation, all the provisions that give power to the HOF and the courts should be read in a manner that comply with each other; so that the problem could be solved.

There are also other factors that affect the independence of the judiciary. For instance, judges are not free from political influence with respect to their appointment. This is clearly displayed in the constitutional appointment of Federal judge that needs the blessing of the parliament; and

their removal as well requires the approval of the house. This influence could also be observed from the composition of members of the judicial administration council. The council is composed of

1. The president of the federal supreme court
2. The vice president of the federal supreme court
3. Three members of the HPR
4. The most senior judge of the Federal supreme court
5. The president of federal High court
6. The most senior judge of the Federal High court; and
7. The president of the federal first instance court.

From this list we can see that three of the members are from the legislative body; that directly shows the involvement of the legislature in the functioning of the judiciary. The appointment and nomination of other members also has to pass through the blessing and approval of both the executive and the legislative organs as it is discussed here under. It is also the parliament /HPR/ that fixes the courts budget. In this regard, Art 79(b) states that the Federal Supreme Court shall draw up and submit to the HPRs for approval the budget of the Federal courts, and upon approval, administer the budget. All these facts show how the legislative arm puts its blow on the judiciary; which clearly affects the overall functioning of the courts.

The Executive Vs the Judiciary

It is not only the legislature that has a say on the functioning of the justice machinery. The executive's control over the judiciary mainly stems from the method of appointment of the judges. As it provided under Art 81(1) the appointment of the president and vice-president of the federal Supreme Court requires the recommendation of the prime minister-the executive; which in turn needs the approval of the HPRs. He is also empowered to submit other federal judges to HPR for appointment after

candidates are selected by the Federal Judicial Administration commission.
/Art. 81(2)/

In addition, it is the council of ministers, which is body of the executive organ that draws up the annual Federal budget and submits to HPR for approval. This may seem a method of checking, but as to the opinion of this writer the idea of checks and balance should come after the approval of the necessary budget; at the stage of implementation. Otherwise, if the legislative and the executive organ are left to fix the budget of the courts, it will hamper the over all plans of the judiciary. It will put the capacity of the courts in the hands of the other two organs. Though the constitution vested the judicial power in courts, these days their power is being eroded for different reasons. For example, proclamations No 90/97 and 90/98 gave special power to banks to foreclose different mortgages or pledges of their debtors by way of execution. These proclamations has provided special procedures so that the banks do not need to bring their cases to courts.

The same also holds true for Rental houses Administration Agency which is given power to execute cases arising from rented houses with out coming to courts. But what should be taken into note is that any aggrieved party have the right to appeal to courts. All these facts magnify the direct and an indirect role of the executive on the activities of the judiciary.

Taking into consideration all the stated facts, one may reach to the conclusion that though the constitution clearly put the power of each government organ, there is power fusion between them. This is a method of checks and balances; and shows that there is no clear separation of powers between the 3 organs of Federal government.

CONCLUSION AND RECOMMENDATIONS

A. Conclusion

So far the writer of this thesis has tried to highlight some relevant issues on the doctrine of separation of powers and the principles of checks and balances by referring to the experiences of some countries of the world.

Many constitutions of the world have different acceptance to the doctrine of separation of powers among their executive, legislative, and judiciary organs. Power is shared among these organs; but one has to ask whether there is an effective method of limiting their power.

Different philosophers like Montesquieu and others, have invented a safety-valve in order to limit the power of a government. This limiting instrument is the doctrine of separation of powers as qualified by the principle of checks and balances. and the horizontal distribution (between the legislative, executive and the judiciary) could be limited by these doctrines.

As discussed in earlier chapter, Ethiopia is a country of devolutionary federalism composed of nine member states. Both the Federal and state governments have their own constitution. All these constitution enjoy supremacy in their spheres. It is proclaimed in the 1995 FDRE constitution all the sovereign power resides in the nation, nationality and peoples of Ethiopia and they exercise this power through their representatives; that is through the legislative, executive and judicial arms of government.

From the constitution one can infer that there is a power demarcation between the 3 organs. But a careful examination to the constitutional provisions magnifies the absence of clear separation. There is no strong separation between the legislative and executive, the executive and the

judiciary, and the legislative and the judiciary. The legislature is involved in the activities of the executive and the judiciary, and so is the executive.

The independence of the judiciary, which is guaranteed by the constitution, is also scratched by the involvement of the other two organs in the activities of the courts.

B. Recommendations

As it has been pointed earlier the involvement of one organ of government in the activities of the others is a great obstacle to the well or normal functioning of that specific organ. In order to deal with such problems different measures should be taken. For example, alike some developed legal systems of the world, the application of the doctrine of separation of powers as qualified by the principle of checks and balances should be cultivated so that the interference would be minimized.

Since the presence of a well organized, strong, and independent judiciary is mandatory for the observance of the constitution, all the courts should be held independent from the involvement of the other two organs; both economically and politically. For the judiciary is the one that implements all the laws passed by the law-maker, it should be strengthened both economically and human resource. For judicial power is inherent in the courts the power of constitutional interpretation should also be included under the power of the courts because it is the courts that every citizen can get easily reach than the house of federation. Therefore, this power should be given to the nearest institutions i.e. courts than the house, which is very remote to the entire population.

The judges also should have life time tenure alike some developed countries of the world. The removal of the judges should only be decided by the judicial administration commission as in the case of South Africa and the composition of members of the judicial Administration council should be free from the involvement of members of the other organ because it affects

the principles of separation of powers. So that they would be free from the interference of the other two organs.

The government should empower and strengthen all those institutions established to protect rights of people, such as office of the Ombudsman, which is established to protect people from maladministration; Ethiopian Human Rights commission working on the respect and protection of Human Rights; and federal Anti corruption and Ethical Commission, These institutions should be kept independent and powerful so that they could play pivotal role in controlling maladministration and acts of government officials; and in a way the acts of some organs could be checked.

To sum up, the 1995 FDRE constitution should be enriched with the basic pillar of democracy-separation of powers doctrine, so that all the three organs could discharge their activities properly for the common goal and observance of the will of the nation, nationalities and peoples of Ethiopia.

End notes for Chapter One

1. (www.saburchill.com/history/his/003.html).
2. (Moodle.bathepublicschool.com) /Moodle/mod/glossary/view.php.)
3. St, Mary's college. constitutional law Module 2 Distance Education
February 2003 page 40
4. Ibid
5. M. J.C vile, constitutionalism and separation of powers (1967)
6. Ibid
7. Encarta Reference library 2005
8. Ibid
9. Constitutional and administrative law by John alder 6th edition page 171
10. Ibid
11. Ibid
12. Ibid
13. Fundamental constitutional principles Related to administrative law and
mechanisms for control of Administrative Agencies. St, Mary's college
module 2 October 2004 page 5
14. Constitutional and administrative law by John alder 6th edition 2007
15. What separation of powers means for constitutional government.
by Charles R. Kessler December 17, 2007 (internet)
16. The wikipedia, the free encyclopedia Http, // en, wikipedia, org/wiki /
checks and balances
17. Andrew Bartlett /senator for queen sland 2007 (internet) www.
democrats, org,
18. Garey.G. The Federalist. (1989) University of Illinois press Chicago.
19. John Jay (publius) (New York: New American Library, 1961) ,47, page
301 gave the definition of tyranny.
20. What separation of powers means for constitutional government
(internet)

End notes for Chapter Two

1. Internet: - www.abanet.Org/publiced/lawday/talking/tpseparation.html
2. Ibid
3. Ibid
4. Ibid
5. Ibid
6. Internet: - [www.en.Wikipedia.Org/wiki/separation of powers](http://www.en.Wikipedia.Org/wiki/separation_of_powers)
7. Ibid
8. Ibid
9. Ibid
10. Ibid
11. J.C Johari, New comparative Government (A Concise study of Domestic politics Around the world) ,2006
12. Ibid, P.192
13. Ibid, P.193
14. Ibid, P.195
15. Ibid, P.200-201
16. Ibid
17. sir Ivor Jennings, cabinet govt/p.8-9/
18. Internet: - [www.en.wikipedia.org/wiki/separation of powers](http://www.en.wikipedia.org/wiki/separation_of_powers)
19. Ibid
20. Ibid
21. J.C. Johari, New comparative government, P. 441ff.
22. Ibid
23. Ibid, p.442
24. Ibid
25. Symposium: the judiciary in a constitutional democracy, wits law school, 25 Nov. 2005
26. Ibid
27. Ibid
28. Supra at note 15
29. Ibid, p.445
30. Supra at note 19
31. Ibid
32. Internet :- checks and Balances reflection on the development of the doctrine of separation of powers under the south African constitution 10 October 2005
33. Ibid
34. Ibid
35. Ibid
36. Ibid

End notes for Chapter Three

1. Tsegaye Regassa, Lecturer, Law Faculty, Ethiopian Civil Service College; State Constitutions in Federal Ethiopia: A Preliminary Observation (A summary for the Bellagio Conference, March 22-27, 2004), unpublished
2. Ibid
3. The 1995 FDRE constitution, Arts. 8-12
4. Supra at note 1
5. Ibid
6. Supra at note 3, Art. 54(5-6)
7. Ibid, Art. 61
8. Supra at note 1
9. Ibid
10. Ibid
11. Supra at note 1
12. Advisor Assefa Fiseha (Dr.), the Role of Ethiopian Courts in Constitutional Interpretation. Under FDRE Constitution, submitted in partial fulfillment of the requirements for the Bachelor of law's degree, Ethiopian Civil Service College, Law Faculty, unpublished, July 7, 2006 A.A.

Bibliography

1. John alder constitutional and administrative law 6th edition 2007
2. J.C Johari, New comparative Government, 2006
3. M. J.C vile, constitutionalism and separation of powers (1967)
4. The 1995 FDRE constitution
5. Charles R. Kessler what separation of powers means for constitutional government. By December 17, 2007
6. Garey.G. The Federalist. (1989) University of Illinois press Chicago.
7. Checks and Balances reflection on the development of the doctrine of separation of powers under the south African constitution . October 2005
8. Fundamental constitutional principles Related to administrative law and mechanisms for control of Administrative Agencies. St, Mary's college module 2 October 2004
9. Tsegaye Regassa, State constitutions in Federal Ethiopia: A Preliminary Observation (A summary for the Bellagio Conference, March 22-27, 2004), unpublished
10. John Jay (publius) (New York: New American Library, 1961
11. www.abanet.Org / publiced/ lawday/ talking/tpseparation.html
12. Symposium: the judiciary in a constitutional democracy, wits law school,
13. St, Mary's college. constitutional law Module 2 Distance Education February 2003
14. Moodle.bathepublicschool.com) /Moodle/mod/glossary/view.php. 25 Nov. 2005
15. Encarta Reference library 2005
16. The wikipedia, the free encyclopedia Http, // en, wikipedia, org/wiki / checks and balances
17. www. en. Wikipedia. Org /wiki/ separation of powers
18. sir Ivor Jennings, cabinet govt/
19. Advisor Assefa Fiseha (Dr.), the Role of Ethiopian Courts in Constitutional Interpretation. Under FDRE Constitution, submitted din partial fulfillment of the requirements for the Bachelor of law's degree, Ethiopian Civil Service College, Law Faculty, unpublished, July 7, 2006
20. [http://en.wikipedia.org/wiki/Impeachment in the United States](http://en.wikipedia.org/wiki/Impeachment_in_the_United_States)



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